Are FmHA Loan Entitlements Protected by the Due Process Clause?

by

Terence J. Centner

Originally published in DRAKE LAW REVIEW
34 DRAKE L. REV. 389 (1984)

ARE FmHA LOAN ENTITLEMENTS PROTECTED BY THE DUE PROCESS CLAUSE?

*Terence J. Centner**

TABLE OF CONTENTS

I. INTRODUCTION

Since the Supreme Court holding in *Goldberg v. Kelly*,[1] the evolution of the entitlement concept for liberty and property interests protected by the due process clauses of the fifth and fourteenth amendments has been accompanied by difficulty in establishing workable parameters of procedural

* Assistant Professor of Agricultural Law, Univ. of Georgia, Athens.

1. 397 U.S. 254 (1970).

protection. The Court's subsequent retreat from the *Goldberg* expansion of Charles Reich's "new property"[2] has been marked by disagreement among the Justices on two questions: how to define protected liberty and property interests, and what constitutes an unconstitutional deprivation.[3] One of the major issues involves the limitation of statutorily created protected interests by procedural conditions.

The difficulty experienced by the Supreme Court in delineating an unconstitutional deprivation of a protected liberty or property interest did not prevent the Eleventh Circuit Court of Appeals from summarily finding that a government housing loan constituted a statutory entitlement protected by the fifth amendment.[4] In *Johnson v. United States Department of Agriculture*,[5] the Eleventh Circuit concluded that there was a substantial likelihood that the nonjudicial foreclosure procedure employed by the Farmers Home Administration (FmHA) in Alabama did not meet the minimum requirements of due process. This holding was based upon the premise that the section 502 FmHA loans create constitutionally protected property interests.[6]

The contention that the interest held by FmHA borrowers is a property interest protected by the fifth amendment due process clause depends upon a finding that either the due process clause or the federal legislation creates a protected interest. Since the due process clause does not provide that governmental loans are protected property interests,[7] a conclusion that the FmHA borrowers are entitled to due process prior to the foreclosure of their property is dependent upon a finding that the federal legislation creates a protected property interest.

The Eleventh Circuit relied on *Goldberg v. Kelly* and other circuit and district court opinions to conclude that the government's issuance of a FmHA loan creates a statutory entitlement protected by the due process

---

2. Reich, *The New Property*, 73 YALE L.J. 733 (1964); Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 YALE L.J. 1245 (1965). *See also* Vandevelde, *The New Property of the Nineteenth Century: The Development of the Modern Concept of Property*, 29 BUFFALO L. REV. 325 (1980).

3. *See generally* Smolla, *The Reemergence of the Right-Privilege Distinction in Constitutional Law: The Price of Protecting Too Much*, 35 STAN. L. REV. 69 (1982) [hereinafter cited as Smolla, *The Reemergence*]; Smolla, *The Erosion of the Principle that the Government Must Follow Self-Imposed Rules*, 52 FORDHAM L. REV. 472 (1984) [hereinafter cited as Smolla, *The Erosion of the Principle*]; Rabin, *Job Security and Due Process: Monitoring Administrative Discretion Through a Reasons Requirement*, 44 U. CHI. L. REV. 60 (1970); Terrell, *"Property," "Due Process," and the Distinction Between Definition and Theory in Legal Analysis*, 70 GEO. L.J. 861 (1981); Tushnet, *The Constitution of the Bureaucratic State*, 86 W. VA. L. REV. 1077 (1984); Wells & Eaton, *Substantive Due Process and the Scope of Constitutional Torts*, 18 GA. L. REV. 201 (1984).

4. Johnson v. United States Dep't of Agriculture, 734 F.2d 774 (11th Cir. 1984).

5. *Id.*

6. *Id.* at 782.

7. Goldberg v. Kelly, 397 U.S. at 275 (Blackmun, J., dissenting).

clause.[8] These cases, however, did not consider the question of whether the legislative and regulatory provisions governing FmHA loans create a statutory entitlement. The Eleventh Circuit's decision failed to consider more recent judicial interpretations of fifth and fourteenth amendment liberty and property interests.[9]

The Supreme Court has made significant pronouncements concerning the parameters of the due process clause since opening a Pandora's box in *Goldberg v. Kelly* by finding that a public assistance recipient threatened with termination of his benefits was entitled to the due process protection afforded by a pretermination hearing.[10] The definition of welfare benefits as a statutory entitlement, which realistically should be viewed as a form of property,[11] opened the door for inclusion of other interests within the fifth amendment's protected interests of liberty and property. *Goldberg v. Kelly* appeared to pave the way for an expansion of procedural due process protection to other types of governmental largess, such as public employment, licenses, and contracts.

The expansion of interests entitled to due process protection that was expected to follow the Warren Court's *Goldberg* decision never fully materialized. Rather, two years later the Burger Court attempted to limit the scope of the due process clause by distinguishing legitimate claims of entitlement from other entitlements.[12] In *Board of Regents v. Roth*[13] and *Perry v. Sindermann*,[14] the Court found that entitlements created and defined by statutory terms are liberty or property interests within the due process clause only if there is some indication that the interest was meant to be a formally protected entitlement. Thus, through further definition of the terms "liberty" and "property," the Court was able to limit the scope of the due process clause.

After the *Roth* and *Sindermann* cases, the Court adopted a positivist approach in *Arnett v. Kennedy*[15] and *Bishop v. Wood*[16] to determine the interests entitled to due process protection.[17] Under the positivist approach,

---

8. Johnson v. United States Dep't of Agriculture, 734 F.2d at 782.

9. *See infra* notes 12-21 and accompanying text.

10. Goldberg v. Kelly, 397 U.S. at 261.

11. A footnote in *Goldberg v. Kelly* announced that such benefits were to be viewed as a form of property. Goldberg v. Kelly, 397 U.S. at 262 n. 8.

12. *See infra* notes 13-19 and accompanying text.

13. 408 U.S. 564 (1972).

14. 408 U.S. 593 (1972).

15. 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974).

16. 426 U.S. 340 (1976).

17. The terms "positivism" and "positivist" are difficult to define in an acceptable manner. In this article, I modify the definition used by Rabin for "positivist approach" to refer to liberty and property interests that are based upon the authority of a government's legislative, regulatory and judicial pronouncements to the exclusion of constitutional sources. Rabin, *supra* note 3, at 67-71. *See also* Smolla, *The Erosion of the Principle*, *supra* note 3, at 473; Hart, *Legal Positivism*, 4 ENCYCLOPEDIA OF PHILOSOPHY 418-20 (1967); J. RAZ, THE AUTHORITY OF LAW

the Court defers to legislative pronouncements to determine what procedural process is required.[18] The Court views the legislative enactment as the definitive source of required procedural safeguards for the enumerated property or liberty interest without proceeding to determine whether the enactment creates a formal entitlement protected by the due process clause.[19] Later, however, in *Vitek v. Jones*[20] and *Logan v. Zimmerman Brush Co.*,[21] the Court retreated from a pure positivist approach and applied minimum federal due process requirements.

In *Johnson v. United States Department of Agriculture*, the Eleventh Circuit failed to analyze the legislation governing FmHA's housing loans to determine what process was due. By cursorily labeling the loan a statutory entitlement, the Court of Appeals neglected to consider the Supreme Court's recent decisions concerning the definitional aspect of a property right that triggers due process protection.[22] The court, by comparing judicial foreclosures with nonjudicial foreclosures to support its conclusion that the latter fail to provide due process, circumvented the issue of whether FmHA borrowers had a meaningful opportunity to contest.[23] In *Johnson* there was no showing of any unfairness in the nonjudicial foreclosure procedure or that a specific borrower had been denied an opportunity to be heard. This article analyzes the statutorily created FmHA loans in view of recent case development to advance the argument that the Eleventh Circuit was incorrect in its finding that the FmHA borrowers had been denied due process.

II. FmHA Housing Loans

The enactment of the Farmers' Home Administration Act[24] in 1946 established the groundwork for the federal government to provide credit for rural housing and agriculture through FmHA. A major program for extending credit for rural housing, however, was not implemented until the enactment of the Housing Act of 1949.[25] This Act stated that the general welfare of our nation required the realization of "a suitable living environ-

---

37-52 (1979).

18. *See supra* note 17.

19. *See supra* note 17.

20. 445 U.S. 480 (1980).

21. 455 U.S. 422 (1982).

22. Johnson v. United States Dep't of Agriculture, 784 F.2d at 782. The court never analyzed the issue of whether a FmHA loan should be found to be a protected property interest but rather stated that "[a] FmHA loan, once made, creates a statutory entitlement and a property interest protected by the Due Process Clause of the Fifth Amendment." *Id* [citations omitted].

23. *Id.* at 783 n.7.

24. Pub. L. No. 731, 60 Stat. 1062 (1946).

25. Pub. L. No. 171, 63 Stat. 413 (1949) (current version at 42 U.S.C. § 1441 *et seq.* (1982)).

ment for every American family."[26] This national housing objective was to be achieved through governmental assistance to private enterprise.[27]

Title V of the Act dealt with housing in rural areas.[28] Section 501 authorized the Secretary of Agriculture to extend financial assistance through FmHA to eligible owners of farms.[29] Eligibility for assistance required a showing that the applicant was the owner[30] of a farm and lacked adequate housing[31] or other farm buildings;[32] the applicant lacked sufficient resources to provide for housing and buildings;[33] and the applicant was unable to secure the credit for the housing and buildings upon reasonable terms from other sources.[34] Subsequent amendments enabled elderly persons to qualify for housing assistance under section 501.[35]

Section 502 of the Housing Act of 1949 provided for loans to be made to applicants who met the eligibility requirements of section 501 if it was determined that the applicant had the ability to repay the loan with interest.[36] Congress enabled the Secretary of Agriculture to give "due consideration to the income and earning capacity of the applicant,"[37] which has led to section 502 loans with adjustable interest rates.[38] A maximum term of thirty-three years was established for section 502 loans.[39] Initially, section 502 loans could be made only to farm owners or other qualifying farm laborers, but

---

26. Pub. L. No. 171, § 2, 63 Stat. 413 (1949) (current version at 42 U.S.C. § 1441 (1982)).

27. *Id.*

28. Pub. L. No. 171, §§ 501-13, 63 Stat. 413, 432-39 (1982).

29. Pub. L. No. 171, § 501, 63 Stat. 413, 432 (1949) (current version at 42 U.S.C. § 1471 (1982)).

30. Paragraph (a) of section 501 extended financial assistance to farm owners, but paragraph (c) extended the eligibility for "necessary resident farm labor, or for the family of the operating tenant, lessee, or sharecropper." *Id.* These provisions have subsequently been amended to include a range of qualifying individuals. *See* 42 U.S.C. § 1471(a) (1982).

31. The term "farm" was defined in section 501(b). Pub. L. No. 171, § 501, 63 Stat. 413, 433 (1949) (current version at 42 U.S.C. § 1471 (1982)). The current definition of a farm is "a parcel or parcels of land operated as a single unit which is used for the production of one or more agricultural commodities for sale and for home use of a gross annual value of not less than the equivalent of a gross annual value of $400 in 1944." 42 U.S.C. § 1471(b)(1) (1982).

32. The housing could be for the applicant and the applicant's family or for the family of the operating tenant, lessee or sharecropper. Pub. L. No. 171, § 501, 63 Stat. 413, 432 (1949) (current version at 42 U.S.C. § 1471 (1982)).

33. Financial assistance could be extended for other farm buildings if the applicant lacked buildings adequate for the farm activities of the applicant or the type of farming the applicant desired to undertake. *Id.*

34. *Id.*

35. Senior Citizens Housing Act of 1962, Pub. L. No. 87-723, § 4, 76 Stat. 670, 670-72 (codified at 42 U.S.C. §§ 1471, 1472, 1474. 1476, 1481, 1485 (1982)).

36. Pub. L. No. 171, § 502, 63 Stat. 413, 433 (1949) (current version at 42 U.S.C. § 1472 (1982)).

37. *Id.*

38. *See* 42 U.S.C. § 1472 (1982).

39. Pub. L. No. 171, § 502, 63 Stat. 413, 433 (1949) (current version at 42 U.S.C. § 1472 (1982)).

the Housing Act of 1961[40] expanded the eligibility requirements of section 501 to include owners of other real estate in rural areas.[41] The population limit of the rural communities in which FmHA may make housing loans was increased by the Housing and Urban Development Act of 1970[42] and the Housing and Community Development Act of 1974.[43]

Section 503 contained provisions whereby applicants without a current ability to repay the loan could qualify for an FmHA loan if they could show an expectation of sufficiently increased income from farming operations due to changed circumstances.[44] Thus, these provisions could be used to assist new farmers who lacked current income, but had the potential to make sufficient income to meet the debt obligations. In addition, section 504 provided for loans to be made to very low income homeowners for repairs to make their homes safe and habitable.[45] The National Energy Conservation Act of 1978 amended section 504 to authorize grants to be made to low income homeowners for weatherization.[46]

FmHA housing loans and other assistance thereby directed funds to families of low and moderate income, and senior citizens.[47] Since 1949, FmHA has provided $39 billion for housing in rural areas through loans, grants, and grant/loan combinations.[48] More than 1.7 million loans or grants

---

40. Pub. L. No. 87-70, 75 Stat. 149 (1961).

41. Pub. L. No. 87-70, § 803, 75 Stat. 149, 186 (1961) (current version at 42 U.S.C. § 1471(a)(1) (1982)).

42. Pub. L. No. 91-609, § 803, 84 Stat. 1770, 1806-07 (1970) (current version at 42 U.S.C. § 1490 (1982)). After the enactment of this Act, FmHA loans could be made to qualifying nonfarmers living in communities of 10,000. *Id.*

43. Pub. L. No. 93-383, § 511, 88 Stat. 633, 695 (1974) (current version at 42 U.S.C. § 1490 (1982)). "Rural" and "rural area" are used in the current FmHA legislative mandate to mean

> any open country, or any place, town, village, or city which is not part of or associated with an urban area and which (1) has a population not in excess of 2,500 inhabitants, or (2) has a population not in excess of 2,500 but not in excess of 10,000 if it is rural in character, or (3) has a population in excess of 10,000 but not in excess of 20,000, and (A) is not contained within a standard metropolitan statistical area, and (B) has a serious lack of mortgage credit for lower and moderate-income families, as determined by the Secretary [of Agriculture] and the Secretary of Housing and Urban Development.

42 U.S.C. § 1490 (1982).

44. Pub. L. No. 171, § 503, 63 Stat. 413, 434 (1949) (current version at 42 U.S.C. § 1473 (1982)).

45. Pub L. No. 171, § 504, 63 Stat. 413, 414 (1949) (current version at 42 U.S.C. § 1474 (1982)).

46. Pub. L. No. 95-619, § 212, 92 Stat. 3206, 3226-27 (1978) (current version at 42 U.S.C. § 1474 (1982)).

47. FARMERS HOME ADMINISTRATION, U.S. DEP'T OF AGRIC., A BRIEF HISTORY OF FARMERS HOME ADMINISTRATION 16 (American Statistical Index 1184-17 (1983)). FmHA is able to further assist very low income homeowners who are eligible applicants but cannot qualify for a housing loan because they lack the ability or potential ability to repay the loan. 42 U.S.C. § 1474 (1982). This assistance may be in the form of a grant or as a combined loan and grant. *Id*

48. FARMERS HOME ADMINISTRATION, U.S. DEP'T OF AGRIC., A BRIEF HISTORY OF FARMERS'

have been made for individual housing in rural areas.[49] In addition, FmHA is able to guarantee up to 90 percent of the repayment of housing loans made by commercial lenders to borrowers of "above moderate" income.[50]

Since 1974, a considerable number of FmHA borrowers for rural housing have experienced difficulties in meeting their repayment obligations.[51] As of October 21, 1984, FmHA had 948,324 borrowers under its rural housing programs and 14.7 percent of those borrowers were delinquent on their loan repayment obligations.[52] This delinquency rate is less than the delinquency rate that existed for individual housing loans from 1975-1982.[53] The delinquency rate, however, does not reflect the number of housing properties that have been acquired, the number foreclosures that have occurred, or the number of borrowers who have voluntarily conveyed their properties to FmHA in exchange for the satisfaction of their loans.[54]

The financial difficulties experienced by FmHA housing borrowers and FmHA farmer program borrowers have led a considerable number of borrowers to apply for relief under the applicable moratoria provisions. These provisions enable a borrower to suspend principal and interest payments on the FmHA loan if the borrower is unable to make payments "without unduly impairing his standard of living."[55] The similar moratoria provisions applicable to farmer loan programs under the Consolidated Farm and Rural

---

HOME ADMINISTRATION 16 (American Statistical Index 1184-17 (1983)). Of this amount, over $30 billion has been provided for individual housing loans. *Id.* at 25.

49. *Id.* at 25.

50. FARMERS HOME ADMINISTRATION, U.S. DEP'T OF AGRIC., A BRIEF HISTORY OF FARMERS HOME ADMINISTRATION 14 (American Statistical Index 1184-17 (1981)).

51. FARMERS HOME ADMINISTRATION, U.S. DEP'T OF AGRIC., REPORT CODE NO. 581, RURAL HOUSING DELINQUENCY REPORT 1 (Oct. 1984).

52. *Id.* Iowa's delinquency rate was only 9.7 percent. *Id.*

53. FARMERS HOME ADMINISTRATION, U.S. DEP'T OF AGRIC., A BRIEF HISTORY OF FARMERS HOME ADMINISTRATION 33 (American Statistical Index 1184-17 (1983)). The reported delinquency rates of individual housing borrowers as of June 30 for the years 1975 through 1982 were 21, 21, 20, 19, 22, 25, 28 and 24 percent, respectively. *Id.*

54. Regulatory authority for debt settlement and voluntary debt adjustment are contained in 7 C.F.R. §§ 1864, 1903 (1984). In 1982, FmHA acquired 8,758 properties worth $198,844,453, and foreclosed on 3,610 properties worth $85,551,849 under its direct and insured rural housing loans. FARMERS HOME ADMINISTRATION, U.S. DEP'T OF AGRIC., REPORT CODE NO. 592, REPORT ON INVENTORY OF ACQUIRED PROPERTY FOR THE PERIOD 01-01-82 THROUGH 12-31-82 17 (American Statistical Index 1184-6 (1983)). In addition, 11,030 voluntary conveyances of property worth $324,771,916 were made to FmHA in 1982. *Id.* During the month of February, 1984, FmHA completed 328 foreclosures against single family housing borrowers, mailed 1,087 acceleration letters, and was involved in 12 bankruptcies that resulted in the loss of borrowers' properties. FARMERS HOME ADMINISTRATION, U.S. DEP'T OF AGRIC., FARM AND HOUSING ACTIVITY REPORT 21 (American Statistical Index 1182-1 (1984)).

55. 42 U.S.C. § 1475 (1982). FmHA reported that 41% of active farmer program borrowers were behind in their scheduled payments of FmHA loans as of February 29, 1984. FARMERS HOME ADMINISTRATION, U.S. DEP'T OF AGRIC., FARM AND HOUSING ACTIVITY REPORT 11 (American Statisical Index 1182-1 (1984)).

Development Act have been the source of considerable litigation.[56] The moratoria provisions, however, have no direct bearing on the issue of whether FmHA loans are constitutionally protected entitlements and therefore are beyond the scope of this article.

FmHA has also recently enacted a special debt set-aside program for postponing a portion of the indebtedness of existing farmer program loans.[57] This interim rule was formulated in response to the severe financial difficulties threatening the ability of many FmHA borrowers to continue operating.[58] The interim rule provides for the postponement of that portion of existing FmHA loans necessary to produce a positive cash flow for five years at zero percent interest.[59] The rule, however, does not apply to FmHA rural housing loans except for housing loans made for farm service buildings.[60]

III. Legitimate Claims of Entitlement

The suggestion in *Goldberg v. Kelly* that federal welfare benefits are more like a property interest than a gratuity formed the basis for the Court's determination that the due process clause[61] is applicable to the termination of such benefits.[62] Because welfare benefits often constitute the recipient's means for daily subsistence, the Court viewed such benefits as akin to property interests.[63] Therefore, the court found that due process safeguards protecting against governmental deprivations of property necessitated a pretermination evidentiary hearing prior to termination of welfare benefits in order to adequately protect the recipient's property interest.[64] The pretermination hearing would allow a recipient to be heard prior to the discontinuance of payments and protect the recipient against an erroneous termination of benefits.[65] Thus, the recipient's ability to participate meaningfully in the termination procedure and in the life of the community could

---

56. 7 U.S.C. § 1981a (1982). The moratoria provisions applicable to Consolidated Farm and Rural Development Act loans have received considerable scrutiny in Curry v. Block, 738 F.2d 1556 (11th Cir. 1984); Matzke v. Block, 732 F.2d 799 (10th Cir. 1984); Ramey v. Block, 738 F.2d 756 (6th Cir. 1984); Allison v. Block, 723 F.2d 631 (8th Cir. 1983)). *See also* Note, *Mandatory or Permissive: Borrowers' Statutory Right to Notice of Deferral Relief for Farmers Home Administration Loans*, 33 Drake L. Rev. 407 (1983); Note, *Agricultural Law: FmHA Farm Foreclosures, An Analysis of Deferral Relief and the Appeals System,"* 23 Washburn L. J. 287 (1984).

57. 49 Fed. Reg. 41,220 (1984) (to be codified at 7 C.F.R. pt. 1951) (proposed Oct. 17, 1984).

58. *Id.*

59. *Id.*

60. *Id.*

61. The Court has not differentiated between the due process clauses of the fifth and fourteenth amendments. Thus, there is no need to distinguish between the two clauses.

62. Goldberg v. Kelly, 397 U.S. 254, 261 n.8 (1970).

63. *Id.*

64. *Id.* at 264.

65. *Id.*

be preserved.[66]

The expansive interpretation of property interests protected by the due process clause suggested by the *Goldberg* Court was shortlived. Two years later, the Court analyzed the liberty and property interests of university faculty in continued employment in *Boards of Regents v. Roth*[67] and *Perry v. Sindermann*[68] and adopted a more limited definition of the interests protected by the due process clause.[69] During the next three years, in *Arnett v. Kennedy*[70] and *Bishop v. Wood*,[71] the Court further limited statutorily created employment interests.

A. *Roth and Sindermann Legitimate Entitlements*

David Roth had been hired pursuant to an academic-year notice of appointment by a state university as a nontenured assistant professor.[72] His appointment was not renewed for the next academic year, and he was never provided with a reason for non-retention or a hearing concerning the nonrenewal.[73] This non-retention policy and procedure was formulated pursuant to rules promulgated by the Board of Regents in accordance with state law.[74] These circumstances led Roth to initiate legal action against the Board of Regents of State Colleges of Wisconsin alleging that the state's decision not to rehire him for the following academic term violated his right to procedural due process of law and his right to freedom of speech.[75]

Sindermann was also a nontenured faculty member who was terminated without a hearing.[76] Sindermann, however, had been employed for ten years in a state educational system that lacked formal tenure.[77] Instead, the published rules and guidelines governing Sindermann's position indicated that faculty members who completed a seven-year probationary period should regard their positions as tenured.[78] Sindermann thereby had a claim that his

---

66. *Id.* at 267.

67. 408 U.S. 564 (1972).

68. 408 U.S. 593 (1972).

69. *See* Smolla, *The Reemergence*, *supra* note 3, at 80-82.

70. 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974).

71. 427 U.S. 341 (1976).

72. Board of Regents v. Roth, 408 U.S. at 567 n.1. The appointment was the equivalent of an employment contract. *Id.*

73. *Id.* at 566. If Roth had been a tenured faculty member, he could not have been "discharged except for cause upon written charges." *Id.* at 567.

74. *Id.* at 566-67 n.2. The rules were promulgated pursuant to state law. *See* WIS. STAT. § 37.31 (1967).

75. Board of Regents v. Roth, 408 U.S. at 568. Only the procedural due process allegation was considered by the Supreme Court. *Id.* at 569.

76. Perry v. Sindermann, 408 U.S. at 596. The Board of Regents issued a press release containing allegations of Sindermann's insubordination, but did not provide him with an official statement of the reasons for nonrenewal of his employment contract. *Id.* at 595 n.1.

77. *Id.* at 594.

78. *Id.* at 600. This *de facto* tenure was conditioned upon satisfactory teaching, a coopera-

de facto tenured status gave him a constitutionally protected property interest in continued employment absent sufficient cause to remove him.[79] His legal action included an allegation that his termination without a hearing violated the fourteenth amendment's guarantee of due process.[80]

The Supreme Court distinguished the two employment situations and found that only Sindermann's position qualified for the protection of the due process clause.[81] The *de facto* tenure system in *Perry v. Sindermann* created an expectation of continued employment, terminable only for cause, that was possibly within the liberty and property interests protected by the fourteenth amendment.[82] Sindermann was thereby entitled to an opportunity to show that he had a legitimate claim of entitlement to job tenure.[83] Roth, however, did not have a property interest in reemployment; therefore, he was not entitled to any due process procedural safeguards.[84]

Board of Regents v. Roth and *Perry v. Sindermann* established some important guidelines for determining whether an interest is entitled to due process protection. The Court, in *Board of Regents v. Roth*, clearly enunciated that property interests are not created by the Constitution.[85] "Rather they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law . . . ."[86] In *Board of Regents v. Roth*, the Court examined the nature of the interest to determine whether the dimensions of the interests caused it to fall within the interests protected by the due process clause.[87] A person does not become entitled to procedural due process merely because of a need for a liberty or property interest to be provided by a governmental unit or because of a unilateral expectation that such an interest will be provided.[88] There must exist a legitimate claim of entitlement before an interest will be afforded due process safeguards.[89] A legitimate claim may arise when the

---

tive attitude toward co-workers, and enjoyment of employment. *Id.*

79. *Id.* at 601. A "policy paper" by the Coordinating Board of the Texas College and University System allegedly established rules governing adequate cause for the dismissal of *de facto* tenured faculty. *Id* at 600-01.

80. *Id.* at 595.

81. *Id.* at 602-03.

82. *Id.* at 602.

83. *Id.* at 603. Thus, the Supreme Court affirmed the judgment of the Circuit Court of Appeals in remanding the case to the district court. *Id.*

84. Board of Regents v. Roth, 408 U.S. at 578-79.

85. *Id.* at 577.

86. *Id.* This establishes the background for the positivist approach the Court adopts in *Arnett v. Kennedy* and *Bishop v. Wood.*

87. *Id.* at 571. The Court disavows determination by examination of the weight of the property interest; the Court, however, may weigh the interests of the parties to determine what procedural process is due. *See* Mathews v. Eldridge, 424 U.S. 319, 340-49 (1976) (applying a balancing test to determine the degree of process that was due).

88. Board of Regents v. Roth, 408 U.S. at 577.

89. Perry v. Sindermann, 408 U.S. at 603; Board of Regents v. Roth, 408 U.S. at 577.

property or liberty interest can only be taken away or terminated "for cause."[90] If the governmental unit has discretion in terminating an interest, the interest probably is not protected by the due process clause.[91]

B. *Conditioned Entitlements*

The Court's preoccupation with the definitions of property and liberty, rather than with procedural safeguards, continued in *Arnett v. Kennedy*[92] and *Bishop v. Wood*.[93] Justice Rehnquist adopted a positivist approach in the plurality opinion in *Arnett v. Kennedy*.[94] Basically, this approach was accepted by the Court in *Bishop v. Wood*.[95] In these two cases, the Court found that the liberty and property interests were conditioned or limited by procedural limitations.[96] Thus, there was no expectancy interest requiring due process protection beyond the procedural protection afforded by the applicable legislation.[97] More recently, the Court has found entitlements to be conditioned by the legislative grant. In *Leis v. Flynt*,[98] the Court concluded that an attorney had no claim of entitlement to appear *pro hac vice*. In *Olim v. Wakinekona*,[99] the Court found that a prisoner did not have a protected liberty interest in being incarcerated in a particular state.

In *Arnett v. Kennedy*, a nonprobationary federal employee of the Office of Economic Opportunity (OEO) was removed from federal service pursuant to provisions of the Lloyd-La Follette Act,[100] supplemental regulations of the Civil Service Commission,[101] and termination provisions of the OEO.[102] These OEO provisions contained various procedural prerequisites that had been met, and the statute contained a mandatory provision that allowed civil service employees to be removed only "for such cause as [would] pro-

---

90. Perry v. Sindermann, 408 at 602-03; Board of Regents v. Roth, 408 U.S. at 578. If Sindermann could show a legitimate claim of a property interest under the alleged *de facto* tenure system, which included the "policy paper" that set forth the requirement of adequate cause for dismissal, then he could be dismissed only "for cause." *See infra* notes 179-83 and accompanying text.

91. *See generally* Perry v. Sindermann, 408 U.S. 593; Board of Regents v. Roth, 408 U.S. 564.

92. 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974).

93. 426 U.S. 340 (1976).

94. *See supra* notes 17-19 and accompanying text and *infra* text accompanying notes 104-08.

95. 426 U.S. at 349-50.

96. *Id.* Arnett v. Kennedy, 416 U.S. at 163-64.

97. *See* Bishop v. Wood, 426 U.S. at 349-50; Arnett v. Kennedy, 416 U.S. at 163-64.

98. 439 U.S. 438 (1979).

99. 103 S.Ct. 1741 (1983).

100. 5 U.S.C. § 7501 (1976).

101. 5 C.F.R. §§ 735.201a, 735.209 (1984).

102. Arnett v. Kennedy, 416 U.S. at 137, 141. The OEO provisions involved are found at 45 C.F.R. Pt. 1015 (1984).

mote the efficiency of said service."[103] There was no provision, however, requiring a trial-type hearing prior to the termination of employment.

Justice Rehnquist, writing for the majority, construed the statutory prohibition of removal without cause in light of the remainder of the statute to define the nature of the employee's property right.[104] The substantive right of employment with the OEO was found to be "inextricably intertwined with the limitations on the procedures which are to be employed in determining that right, a litigant in the position of [the employee] must take the bitter with the sweet."[105] The employee's substantive right to employment was conditioned by such procedural limitations of the applicable provisions.[106] Since the employer had followed such procedures, the employee had no right to employment.[107] Thus, by adopting this positivist approach, the Court failed to find a constitutional violation in the government's termination of the employee.[108]

Three years later, in *Bishop v. Wood*, the Court had the opportunity to consider whether a policeman had been denied due process when he was discharged without a pretermination hearing.[109] The discharged policeman argued that pursuant to the applicable city ordinance he was a permanent employee with a property interest in his continued employment.[110] Writing for the Court, Justice Stevens looked to state law to determine the sufficiency of the property interest. He concluded that the ordinance could be read either as granting a guarantee of continued employment or as conditioning removal on compliance with specified procedures.[111] Justice Stevens then deferred to the district court's interpretation of the ordinance and adopted the latter construction; the policeman "held his position at the will and pleasure of the city."[112] Since the district court had found that the procedural rights set forth in the ordinance had been followed by the city,[113] the discharge did not deprive the policeman of a property interest protected by the fourteenth amendment.[114]

The Court interpreted state law as conditioning the rights of out-of-state attorneys in *Leis v. Flynt*.[115] Out-of-state attorneys attempted to re-

---

103. 37 Stat. 539, 555 (1912) (current version at 5 U.S.C. § 7513(a) (1982).

104. Arnett v. Kennedy, 416 U.S. at 153.

105. *Id.* at 153-54.

106. *Id.* at 163.

107. *Id.*

108. *Id.* at 163-64.

109. Bishop v. Wood, 426 U.S. at 341, 343.

110. *Id.* at 343-44. The Court noted that either an ordinance or an implied contract could create a property interest in employment. *Id.*

111. *Id.* at 344-45. A guarantee of continued employment may establish a legitimate property interest for due process purposes. *See* Perry v. Sindermann, 408 U.S. 593, 600-01 (1972).

112. Bishop v. Wood, 426 U.S. at 345 n.8.

113. Bishop v. Wood, 377 F. Supp. 501, 503 (W.D.N.C. 1973).

114. Bishop v. Wood, 426 U.S. at 347.

115. 439 U.S. 438 (1979).

present their clients in an Ohio court without obtaining permission to appear *pro hac vice*.[116] The court's decision that it would not allow the attorneys to represent their clients prompted the attorneys to file a suit to enjoin further prosecution of their clients until a hearing was held concerning the contested *pro hac vice* application.[117] On appeal, the Sixth Circuit affirmed the district court by holding that a meaningful hearing was required before lawyers could be denied the privilege of appearing *pro hac vice*.[118]

The Supreme Court, however, found that there was no deprivation of a property right under state law, and reversed the Sixth Circuit decision.[119] The Court found no statute or legal rule that created a right for out-of-state attorneys to appear in Ohio courts.[120] In addition, the Court rejected the rules, precedents, and practices of some Ohio courts that required a showing of cause before denying leave for out-of-state attorneys to appear *pro hac vice*.[121] Rather, the rules of the Ohio Supreme Court expressly granted trial courts discretion over approving *pro hac vice* appearances.[122] Thus, *Leis v. Flynt* suggests that custom or tradition may not be a sufficient basis to give an interest legitimate entitlement status.[123]

The recent case of *Olim v. Wakinekona*[124] again shows the Court limiting the property and liberty interests protected by the due process clause. Wakinekona was a prisoner serving a life sentence at a Hawaiian prison with no possibility of parole.[125] For security and other reasons, the administrator of the Hawaii State Prison transferred Wakinekona to a state prison in California pursuant to the applicable state rules and regulations concerning transfers.[126] Wakinekona filed suit alleging that the procedures employed in his transfer denied him procedural due process.[127] The Ninth Circuit agreed

---

116. *Id.* at 439-40. The out-of-state attorneys had been listed on an entry of counsel form presented by their local attorney to the judge at arraignment. *Id.* Although this judge endorsed the form, it did not constitute an application for admission *pro hac vice*. *Id.*

117. *Id.* at 440-41; *see* Flynt v. Leis, 434 F. Supp. 481, 483 (S.D. Ohio 1977).

118. Flynt v. Leis, 574 F.2d 874, 879 (6th Cir. 1978).

119. Leis v. Flynt, 439 U.S. at 443-44.

120. *Id.* at 442-43.

121. *Id.* at 444 n.5. The Court identifies the interest of the out-of-state attorneys to appear *pro hac vice* as being analogous to the right of a lawyer to practice law in a state without admission to the state's bar. *Id.* As noted by Justice Rehnquist in his dissent, the right to practice law and the right to appear *pro hac vice* are not the same. *Id.* at 458 n. 30 (Rehnquist, J., dissenting).

122. *Id.* at 442-43.

123. Justice Stevens, who had authored *Bishop v. Wood*, did not agree with the majority in *Leis v. Flynt*. In his dissent he identified the interest of practicing law as an interest protected by the due process clause. Leis v. Flynt, 439 U.S. at 452-53 (Stevens, J., dissenting). *See also* Terrell, *supra* note 3, at 912-18.

124. 103 S. Ct. 1741 (1983).

125. *Id.* at 1743.

126. *Id.* at 1743-44.

127. *Id.* at 1744. The Ninth Circuit found that state regulations had created a justifiable expectation that prisoners would not be transferred to the mainland absent certain procedural

and found that the state prison regulations created a constitutionally protected liberty interest.[128]

The Supreme Court reversed the Ninth Circuit and concluded that the interstate transfer of Wakinekona did not deprive him of any liberty interest; thus, no due process violation had occurred.[129] As a convicted prisoner, Wakinekona had only a residuum of liberty, and it did not include an interest in remaining in a particular prison facility or a particular state.[130] Furthermore, the Ninth Circuit's conclusion that the Hawaiian prison regulations created a protected liberty interest was incorrect and contrary to the interpretation of the regulations rendered by the Supreme Court of Hawaii.[131] The regulations granted the prison administrator discretion in transferring inmates.[132] Since there were no substantive limitations on the administrator's discretion, the regulations did not create a liberty interest.[133] Thus, the transfer of Wakinekona to California pursuant to the prison regulations did not infringe upon a protected liberty interest.[134]

The approach of the Court in analyzing property and liberty interests in these cases has not always been consistent.[135] The claimed liberty and property interests have been varied, and the unique facts of each case necessarily limit the precedent established by each opinion.[136] The cases also reveal considerable disagreement among the Justices upon what constitutes a pro-

---

safeguards. Wakinekona v. Olim, 664 F.2d 708, 711-12 (9th Cir. 1981).

128. *Id.* at 712.

129. Olim v. Wakinekona, 103 S. Ct. at 1747.

130. *Id.* at 1745. The Court found it necessary to distinguish a special residuum of liberty interests for prisoners in order to accommodate its prior holding in *Vitek v. Jones*, 445 U.S. 480 (1980). Olim v. Wakinekona, 103 S. Ct. at 1745 n.6. In *Vitek*, the Court had found that an inmate had a liberty interest protected by the due process clause that prevented his transfer from a prison to a mental hospital absent adequate notice and a hearing. Vitek v. Jones, 445 U.S. at 480. The inmate's liberty interest arose because placement in a mental hospital was beyond the expected conditions of a normal sentence and qualitatively different from incarceration in a prison facility. *Id.* at 493.

In *Olim v. Wakinekona*, the Court found that the transfer of a prisoner to another state was not unusual or unreasonable since many states had statutes that permitted this practice. Olim v. Wakinekona, 103 S. Ct. at 1746. The Court's reliance on these statutes, however, to conclude that the interstate transfer did not infringe upon the prisoner's liberty interest is a mockery of the *Vitek* opinion. *See* Smolla, *The Erosion of the Principle*, *supra* note 3, at 495-96. Statutes providing for the transfer of inmates to mental hospitals are also common. *Id.* Thus, under the reasoning in *Olim v. Wakinekona*, the *Vitek* inmate did not have a protected liberty interest.

131. Lono v. Ariyoshi, 63 Hawaii 138, 621 P.2d 976 (1981).

132. Olim v. Wakinekona, 103 S. Ct. at 1747.

133. *Id.* at 1747-48. The regulations thereby failed to contain a "for cause" requirement that would create a protected interest as had been found in *Perry v. Sindermann*, 408 U.S. 593 (1972).

134. *Id.* at 1748.

135. *See supra* text accompanying notes 72-134.

136. *See supra id.*

tected liberty or property interest.[137] Taken as a whole, however, the cases disclose a reluctance to interpret legislative grants or state law as establishing protected liberty or property interests.[138] Unless the interest has been guaranteed, as occurs when there is a "for cause" provision, the Court is unlikely to find that the interest is entitled to the procedural protections of the due process clause.[139]

IV. A Protected Interest in Johnson

In *Johnson v. United States Department of Agriculture,* the homeowners sought to enjoin FmHA from using Alabama's nonjudicial foreclosure procedure.[140] The homeowners claimed that the procedure failed to provide minimum standards of due process.[141] Having concluded that the FmHA housing loans were a protected property interest, the Eleventh Circuit turned to the issue of whether an unconstitutional deprivation had occurred.[142] In determining that issue, the court examined the nonjudicial foreclosure procedure used by FmHA.[143] The court opined that there was a substantial likelihood that borrowers could show that the procedural protections afforded by Alabama's nonjudicial foreclosure statute failed to provide homeowners with an adequate opportunity to challenge the potential loss of their homes.[144] Since the court noted that it was assuming that adequate notice of foreclosure had been granted to homeowners,[145] its conclusion that the facts justified the issuance of a preliminary injunction was premised upon the finding that the nonjudicial foreclosure procedure did not provide a meaningful opportunity to contest the government's decision to foreclose.[146]

In reaching its conclusion, the *Johnson* court neglected to analyze the scope and definition of the interest established by Congress and the contractual nature of the loans. Recent cases imply that a court must analyze the legislative and regulatory grant before it can determine whether an interest protected by the due process clause exists.[147] This analysis should center on

---

137. *See supra id.*

138. *See supra id.*

139. *See supra id.*

140. Johnson v. United States Dep't of Agriculture, 734 F.2d 774, 775 (11th Cir. 1984). The homeowners also raised a novel equal protection argument which constituted a second issue supporting an injunction. *Id.* at 784-89.

141. *Id.* at 775.

142. *Id.* at 782-83.

143. *Id.*

144. *Id.* at 784.

145. *Id.* at 782. The circuit court noted that it appeared that all plaintiffs had received notice repeatedly concerning the foreclosure of their properties. *Id.*

146. *Id.* at 789.

147. *See, e.g.,* Olim v. Wakinekona, 103 S. Ct. 1741, 1748 (1983) (concluding that Hawaii's prison regulations did not create a protected liberty interest prohibiting transfer of inmates to

the nature of the interest.[148] The *Johnson* decision thereby raises two major questions. First, do FmHA homeowner borrowers have property interests protected by the due process clause? Second, does the Alabama nonjudicial foreclosure procedure deprive homeowner borrowers of a meaningful opportunity to contest the foreclosure and thereby constitute an unconstitutional deprivation?

A. *Protected Property Interests*

The protected property interests alleged in *Johnson* were FmHA housing loans created under the rural housing loan program of section 502 of the Housing Act of 1949.[149] Thus, the legislative and regulatory provisions of the section 502 program governed the interest held by the homeowner borrowers. These provisions required each homeowner borrower to sign a note that provided for "repayment of principal and interest in accordance with schedules and repayment plans prescribed by the Secretary" of Agriculture.[150] Although the promissory note arguably interjected a contractual element into the interest held by borrowers, such notes were issued pursuant to duly enacted regulations and could be considered to be a part of the legislative and regulatory grant.

In *Johnson*, FmHA used a standardized note for its section 502 loans.[151] The note contained conditions and terms that FmHA felt were necessary to secure the payment of the loan with interest, protect the security, and assure that the housing would be maintained in repair.[152] The standardized mortgage notes contained a "power of sale" provision whereby borrowers agreed that if certain conditions concerning loan delinquency were met, then FmHA could foreclose under state law.[153] This provision allowed FmHA to foreclose through a nonjudicial procedure in Alabama and other states that had legal authority for nonjudicial foreclosures.[154]

FmHA initiated nonjudicial foreclosure proceedings in Alabama pursuant to the Alabama Code.[155] The decision to foreclose was made by the

---

out of state facilities); Hewett v. Helms, 103 S. Ct. 864, 871 (1983) (finding that the mandatory language of Nebraska regulations demanded the conclusion that the state had created a protected liberty interest); Vitek v. Jones, 445 U.S. 480, 490 (1980) (holding that state statute created a liberty interest entitling inmate to appropriate procedures prior to his transfer to a mental hospital). *See also* Bishop v. Wood, 427 U.S. 341 (1976); Arnett v. Kennedy, 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974); Perry v. Sindermann, 408 U.S. 593 (1972); Board of Regents v. Roth, 408 U.S. 564 (1972).

148. Board of Regents v. Roth, 408 U.S. at 571.

149. 42 U.S.C. § 1471 (1982).

150. *Id.* § 1472(b)(2).

151. Johnson v. United States Dep't of Agriculture, 734 F.2d at 777.

152. *Id. See* 42 U.S.C. § 1472(b)(4) (1982).

153. Johnson v. United States Dep't of Agriculture, 734 F.2d at 777.

154. *Id.* at 778.

155. *Id.* ALA. CODE § 35-10-1 (1977). Alabama also permits nonjudicial foreclosure when

FmHA county supervisor who was responsible for servicing all section 502 loans.[156] The foreclosure decision was approved by the State Director.[157] The nonjudicial foreclosure proceeded with notice to the homeowners of the repossession date, the planned sale, and the availability of appeal procedures.[158] The homeowner could initiate the FmHA appeal process and request a hearing prior to foreclosure,[159] but would bear the burden of proving that the decision to foreclose was erroneous.[160] The hearing would be before the hearing officer, a FmHA official, and could be recorded.[161] In addition, a designated FmHA employee would take notes.[162] If the homeowner received an unfavorable decision from the hearing officer and felt there were significant errors in the hearing notes, the homeowner could obtain further review by notifying the hearing officer.[163] An unfavorable ruling from this administrative procedure could be reviewed in a judicial proceeding.[164]

The government's foreclosure of property purchased in part with section 502 loan program funds affects the property interest created by the legislative grant. The existence of a statutorily created property interest, however, does not settle the issue of whether the interest is to be afforded due process protection.[165] Rather, a borrower's interest must be within the property interests protected by the fifth amendment in order to qualify for the protection afforded by the due process clause.

B. *Misplaced Reliance on Goldberg*

The *Johnson* court relied on the *Goldberg* holding that welfare benefits were protected property interests to conclude that FmHA borrowers had a property interest in section 502 loans.[166] *Goldberg v. Kelly*, however, does not say, and the Supreme Court has not found, that all monetary benefits accruing from government action constitute statutory entitlements protected by the due process clause. The *Mathews v. Eldridge*[167] decision, in which the Court held that disability benefits could be terminated prior to a pretermination hearing, clarifies the premise that certain forms of govern-

---

the note does not contain a power of sale provision. ALA. CODE § 35-10-3 (1977).

156. Johnson v. United States Dep't of Agriculture, 734 F.2d at 778-79.

157. *Id.*

158. *Id.* at 779, 782.

159. 7 C.F.R. § 1900.56 (1984).

160. *Id.* § 1900.57(a).

161. *Id.* §§ 1900.57, .52(f).

162. *Id.* § 1900.57(d). The employee designated may not be the FmHA official who made the decision to foreclose. *Id.* The notes informally reflect the pertinent information presented by the parties. *Id.*

163. *Id.* § 1900.57(j).

164. *Id.* § 1900.59(b).

165. *See infra* notes 168-69 and accompanying text.

166. Johnson v. United States Dep't of Agriculture, 734 F.2d at 774.

167. 424 U.S. 319 (1976).

ment assistance may be limited or defined by accompanying procedural provisions.[168] The sufficiency of an argument that a legislative grant creates a statutory entitlement is dependent upon the legislative and regulatory grant of that interest.[169]

The section 502 loans in *Johnson* were made in order to help qualifying disadvantaged rural residents obtain decent housing.[170] Since the loans were made to persons who could not qualify for loans from commercial sources,[171] and the interest rates for the loans were below the market rate,[172] the loans arguably constituted a type of government largess.[173] The loans, however, were not gifts. Furthermore, since the loans were made pursuant to a note signed by each borrower, the government's grant of each loan was inextricably intertwined with the provisions of the note.[174] Since the note contained a power of sale provision, which allowed the government to use a legislatively sanctioned nonjudicial foreclosure procedure when the borrower defaulted on the note, borrowers accepting loan funds also accepted these provisions.[175]

The *Johnson* court did not deny that the legislative grant allowed the government to foreclose through a nonjudicial procedure. Rather, the court examined the validity of the power of sale clause to determine whether it should control the disposition of the case.[176] This analysis begs the question of whether a protected property interest exists. The validity of a waiver provision neither enhances nor diminishes the interest granted to section 502 homeowner borrowers. The validity of a waiver provision concerns a borrower's meaningful opportunity to be heard and is only important in a due process context if a protected property interest exists.[177]

---

168. *See infra* notes 188-98 and accompanying text. *See also* O'Bannon v. Town Court Nursing Center, 447 U.S. 773, 791-805 (1980) (Blackmun, J., concurring).

169. Hewitt v. Helms, 103 S. Ct. 864, 872 (1983); Bishop v. Wood, 426 U.S. 341, 344 n.7 (1976); Arnett v. Kennedy, 416 U.S. 134, 155, *reh'g denied*, 417 U.S. 977 (1974).

170. *See* Johnson v. United States Dep't of Agriculture, 734 F.2d at 776.

171. *Id.*

172. *Id.* at 777.

173. Thus, the statutorily created interest was a temporary interest in governmental funds. Although the funds were to be repaid with interest to the government, the favorable interest provisions gave borrowers a benefit that would not be repaid. Foreclosure operated to accelerate the return of the government's funds thereby affecting the borrowers' property interests under the section 502 loan program.

174. Johnson v. United States Dep't of Agriculture, 734 F.2d at 777.

175. *Id.*

176. *Id.* at 783-84. The court found that through the power of sale clause the borrowers had waived the automatic procedural protections that are present in a judicial foreclosure. *Id.*

177. This is analogous to the Court's reasoning in *Bishop v. Wood* concerning the falsity of the statement that was the basis of the policeman's discharge from employment. The Court found that "[t]he truth or falsity of the City Manager's statement determines whether or not his decision to discharge the petitioner was correct or prudent, but neither enhances nor diminishes petitioner's claim that his constitutionally protected interest in liberty has been impaired." Bishop v. Wood, 426 U.S. at 349. Likewise, the superior bargaining position of FmHA

V. An Unconstitutional Deprivation

The interests protected by the due process clauses of the fifth and fourteenth amendments cannot be unconditionally limited by a legislative grant.[178] Although governments may be able to create interests that are conditioned by accompanying procedural limitations, the Supreme Court will analyze the procedures to ascertain that they are fair and meet minimum federal procedural requirements.[179] Minimum federal due process requirements preclude the termination or deprivation of governmentally created largess or protected interests without granting the recipients a requisite degree of due process.[180] The failure of a government to provide adequate notice or an opportunity to be heard prior to the deprivation of a property interest results in an unconstitutional deprivation.[181]

The Supreme Court has established the parameters of unconstitutional deprivation through its decisions, in several cases. An important break with previous cases occurred in *Mathews v. Eldridge*.[182] In that case, the Court looked beyond the government's compliance with the statutory procedures and used a balancing test to justify the legislative scheme.[183] This balancing test subsequently was applied in *Memphis Light, Gas & Water Division v. Craft*,[184] and *Hewitt v. Helms*.[185] In *Vitek v. Jones*,[186] the Court applied federal minimum due process requirements to a state procedure for transferring a prisoner to a mental hospital. A state statute that operated to destroy a property interest without an opportunity for the owner to be heard was found to violate the due process clause in *Logan v. Zimmerman Brush Co.*[187]

A. *The Eldridge Balancing Test*

In *Mathews v. Eldridge*, the Court considered whether the due process clause required the federal government to afford a recipient of Social Security disability benefits a hearing prior to the termination of benefits.[188] The district court had analogized Eldridge's disability benefits with the welfare

---

in relation to borrowers does not affect the interest created by the governing legislative and administrative grant.

178. *See* Logan v. Zimmerman Brush Co., 455 U.S. 422, 429-30 (1982).

179. *Id.* at 432.

180. *See id.* at 433.

181. *See id.*

182. 424 U.S. 319 (1976).

183. *Id.* at 341-48. As noted by Professor Smolla, if the Court had followed the positivist approach, there would have been no reason to apply a balancing test since the Court was not considering the issue of whether the government had departed from the legislatively mandated procedures. Smolla, *The Reemergence*, *supra* note 3, at 103-04.

184. 436 U.S. 1 (1978).

185. 103 S. Ct. 864 (1983).

186. 445 U.S. at 480 (1980).

187. 455 U.S. 422 (1982).

188. Mathews v. Eldridge, 424 U.S. 319, 323 (1976).

benefits in *Goldberg v. Kelly* and had concluded that they were indistinguishable.[189] Thus, the lower court held that Eldridge had to be afforded an evidentiary hearing prior to the termination of benefits.[190]

The Supreme Court reversed, finding that the injury caused by the wrongful termination of Eldridge's disability benefits, although similar in nature, was less in degree than the injury to the welfare recipient in *Goldberg v. Kelly*.[191] The Court noted that while welfare recipients were on the very margin of subsistence and the discontinuation of benefits could deprive recipients of the very means by which to live, disability benefits were wholly unrelated to the recipients' other sources of income or support.[192] An analysis of three factors, later expounded upon in *Memphis Light, Gas & Water Division v. Craft*,[193] led the Court to find that the *Goldberg* requirement of an evidentiary hearing prior to adverse administrative action did not apply to the discontinuation of disability benefits.[194] The Court's analysis of these factors, despite the government's compliance with the legislatively mandated procedures, impliedly rejects a pure positivist approach.

The three factors the Court set out for assessing the validity of any administrative decision-making process were: (1) the private interest affected by official action and the degree of potential deprivation; (2) the reliability and fairness of the existing pretermination procedures and the value of additional procedural safeguards; and (3) the public interest in limiting additional financial costs.[195] The Court concluded that "[t]he ultimate balance involves a determination as to when . . . judicial-type procedures must be imposed upon administrative action to assure fairness."[196] Applying these factors, the Court found that the disability claimant had an effective process for asserting claims and obtaining redress.[197] Thus, the Court was able to distinguish *Mathews v. Eldridge* from *Goldberg v. Kelly* and retreat from the requirement of a pretermination hearing.[198]

Justice Rehnquist's opinion in *Hewitt v. Helms*, which applies the *Eldridge* balancing test,[199] further illustrates recent judicial pronouncements. Helms, an inmate who was placed in restrictive confinement, instituted the

---

189. Eldridge v. Weinberger, 361 F. Supp. 520, 523 (W.D. Va. 1973), *aff'd*, 493 F.2d 1230 (4th Cir. 1974), *cert. granted*, 419 U.S. 1104 (1975), *rev'd sub nom.* Mathews v. Eldridge, 424 U.S. 319 (1976).

190. *Id.* at 528.

191. Mathews v. Eldridge, 424 U.S. at 341.

192. *Id.* at 340-41. The Court concluded that the deprivation thereby was less than had been present in *Goldberg v. Kelly*. *Id.* at 341.

193. 436 U. S. at 17-18.

194. Mathews v. Eldridge, 424 U.S. at 349.

195. *Id.* at 341-47; Memphis Light, Gas & Water Div. v. Craft, 436 U.S. at 17-18.

196. Mathews v. Eldridge, 424 U.S. at 348.

197. *Id.* at 349.

198. *Id.* at 341. *Goldberg v. Kelly* was not overruled, but must be read in conjunction with *Mathews v. Eldridge* to determine the parameters of due process protection.

199. Hewitt v. Helms, 103 S. Ct. at 872.

action claiming that his separation from other inmates violated his rights under the due process clause.[200] More specifically, Helms contended that this segregation was an outright violation of the due process clause and was also violative of his liberty interest created by applicable state law.[201] Relying on precedent, the Court quickly disposed of the federal due process claim.[202] In previous cases the Court had found that not every substantive deprivation imposed by prison authorities triggers the procedural protections of the due process clause because incarceration involves the withdrawal and limitation of privileges and rights.[203] Thus, the administrative segregation of inmates does not involve an interest independently protected by the due process clause.[204]

The Court, however, reached the opposite conclusion in addressing the contention that state law created a liberty interest entitled to constitutional due process protection.[205] Although accepting the premise that adoption of procedural guidelines does not evince a legislative intent to create a protected liberty interest,[206] the Court concluded that the mandatory language requiring that specific substantive procedures be employed before segregating inmates created a protected liberty interest.[207] The Court then proceeded to apply the balancing test from *Mathews v. Eldridge* to determine what process was due.[208] The Court concluded that the state was obligated to provide the inmate with an informal, nonadversary evidentiary review.[209]

B. *Minimum Requirements of Due Process*

A major deviation from earlier cases occurred in *Vitek v. Jones*.[210] The Court relied on minimum federal due process requirements to find that Nebraska's involuntary transfer of an inmate to a mental hospital without appropriate procedural protections deprived the inmate of a protected liberty interest.[211] Thus, in *Vitek v. Jones*, the Court found that the procedural protection established by the Nebraska legislature for a legislatively created liberty interest was insufficient because the interest was also governed by

---

200. *Id.* at 866.
201. *Id.*
202. *Id.* at 869.
203. *Id.*
204. Hewitt v. Helms, 103 S. Ct. at 869.
205. *Id.* at 871.
206. *Id.* This premise is consistent with the positivist approach taken by the Court in other cases. *See, e.g.*, Olim v. Wakinekona, 103 S. Ct. 1741, 1748 (1983); Leis v. Flynt, 439 U.S. 438, 442-44 (1979); Bishop v. Wood, 426 U.S. 340, 344-45 (1976); Arnett v. Kennedy, 416 U.S. 134, 153-64, *reh'g denied*, 417 U.S. 977 (1974).
207. Hewitt v. Helms, 103 S. Ct. at 871.
208. *Id.* at 872. *See supra* notes 195-96 and accompanying text.
209. Hewitt v. Helms, 103 S. Ct. at 874.
210. 445 U.S. 480 (1980).
211. *Id.* at 487-88.

federal law.[212]

The Nebraska statute provided for the transfer of a prisoner to a mental hospital when the correctional facility could not provide adequate treatment for the prisoner suffering from a mental illness, as determined by a physician or psychologist.[213] The Court found that this statute created a constitutionally protected liberty interest.[214] Rather than defining this liberty interest as conditioned upon state procedural prerequisites set forth in the statute, the Court imposed minimum federal due process requirements.[215] The state's statutory procedure whereby the opinion of a physician or psychologist was sufficient to warrant the transfer of an inmate to a mental hospital did not meet the minimum federal procedural requirements.[216] The Court held that adequate notice and a hearing that would provide the inmate with the opportunity to be heard in person and enable the inmate to present documentary evidence prior to the transfer were necessary to protect the inmate's liberty interest.[217]

The Court's recognition of minimum federal due process requirements in *Vitek v. Jones* indicates that a person's due process rights in a liberty or property interest may require notice and hearing procedures beyond those set forth in the applicable legislation. The scope or applicability of these requirements, however, is not clear. Despite the finding that a statutorily created liberty interest was entitled to due process protection in *Vitek v. Jones*, the Court subsequently found, in *Olim v. Wakinekona*, that the transfer of an inmate to an out-of-state prison did not invoke minimum federal due process requirements.[218] The Court avoided application of federal due process requirements in *Olim v. Wakinekona* by concluding that the Hawaiian prison regulations did not create a protected liberty interest.[219]

Logan v. Zimmerman Brush Co.[220] has been viewed as a significant break from *Arnett v. Kennedy* and *Bishop v. Wood* because the Court declined to sanction a legislative and judicial determination of the nature of the entitlement.[221] The Illinois legislature had enacted a mandatory 120-day period for convening a factfinding conference to consider an employee's charge of unfair discrimination.[222] The Illinois Supreme Court interpreted this mandatory period as constituting a jurisdictional limitation that re-

---

212. *Id.* at 491.
213. NEB. REV. STAT. § 83-180(1) (1981).
214. Vitek v. Jones, 445 U.S. at 487-88.
215. *Id.* at 491.
216. *Id.*
217. *Id.* at 494-96.
218. Olim v. Wakinekona, 103 S. Ct. 1741 (1984). *See supra* notes 124-34.
219. Olim v. Wakinekona, 103 S. Ct. at 1745-47.
220. 455 U.S. 422 (1982).
221. Smolla, *The Reemergence*, *supra* note 3, at 107-11.
222. Logan v. Zimmerman Brush Co., 455 U.S. at 424; ILL. REV. STAT. ch. 48, § 858(b) (1970).

stricted the legislatively created relief for discriminatory employment practices.[223] Thus, the Illinois court found that the statutory time period defined the employee's expectation of relief.[224] Since the conference was not held within the requisite period, the employee had no right to relief under the statute; thus, there was no due process violation.[225]

In reversing the judgment of the Illinois Supreme Court, the Supreme Court found a property interest protected by the due process clause.[226] The Court read the 120-day period as a procedural limitation on an employee's ability to assert a discrimination claim, rather than a substantive element governing the employee's right to relief.[227] The Court also interpreted the statutory procedure as creating a "for cause" requirement that precluded deprivation of the property interest without appropriate due process safeguards.[228] This interpretation indicated that by filing the charge, the employee established a property right entitled to due process protection.[229]

C. *Post-Deprivation Remedies*

In *Vitek v. Jones* and *Logan v. Zimmerman Brush Co.*, the Supreme Court rejected the argument that the legislative grant could unconditionally limit constitutionally protected interests.[230] In refusing to sanction the statutorily defined procedural limitations, the Court found that the minimum federal due process requirements of adequate notice and an opportunity to be heard had not been met.[231]

The Supreme Court has further defined the meaning of deprivation of property without due process under the fourteenth amendment in *Parratt v. Taylor*[232] and *Hudson v. Palmer*,[233] two cases concerning the property interests of inmates. In both cases, the Court proceeded on the assumption that the inmates had been deprived of property.[234] In *Parratt v. Taylor*, the property had been negligently taken by an employee of the state;[235] in *Hudson v. Palmer*, there had been an intentional deprivation of property by a state employee.[236]

---

223. Zimmerman Brush Co. v. Fair Employment Practices Comm'n, 82 Ill. 2d 99, 106, 411 N.E.2d 277, 282 (1980), *rev'd sub nom.* Logan v. Zimmerman Brush Co., 455 U.S. 422 (1982).
224. *Id.* at 106-07, 411 N.E.2d at 282.
225. *Id.*
226. Logan v. Zimmerman Brush Co., 455 U.S. at 433.
227. *Id.*
228. *Id.* at 431. *See infra* notes 248-53 and accompanying text.
229. Logan v. Zimmerman Brush Co., 455 U.S. at 428-32.
230. *Id.* at 432-37; Vitek v. Jones, 445 U.S. at 490-91.
231. Logan v. Zimmerman, 455 U.S. at 428-37; Vitek v. Jones, 445 U.S. at 493-96.
232. 451 U.S. 527 (1981).
233. 104 S. Ct. 3194 (1984).
234. *Id.* at 3202-05; Parratt v. Taylor, 451 U.S. at 530.
235. Parratt v. Taylor, 451 U.S. at 530.
236. Hudson v. Palmer, 104 S. Ct. at 3202.

In determining the issue of whether the deprivations of property were protected by the due process clause of the fourteenth amendment, the Court concluded that neither deprivation was protected because each inmate had been afforded due process.[237] Each inmate had been granted a reasonable procedure and process for redressing the alleged deprivation, including a post-deprivation remedy affording the opportunity to be heard, and a tort claims procedure.[238] A post-deprivation remedy, as opposed to predeprivation process, was found by the Court to be sufficient because it would be impossible for a state to initiate a predeprivation hearing for negligent or intentional deprivations of property.[239] Thus, *Parratt v. Taylor* and *Hudson v. Palmer* support the conclusion that an adequate post-deprivation remedy will be sufficient to satisfy due process requirements.

VI. Interpreting the Johnson Legislative Grant

In *Johnson v. United States Dep't of Agriculture*, the court classified the legislation as welfare legislation similar to that considered in *Goldberg v. Kelly*.[240] Such classification, however, does not define the protection that must be afforded to the legislatively created property interest.[241] Rather, the language of the grant must be interpreted in view of the legislative intent[242] and minimum federal due process requirements.[243]

An analysis of the legislative grant in *Johnson* discloses a number of provisions that are similar to provisions within legislative grants considered by the Supreme Court in other cases. There also are a number of provisions that distinguish *Johnson* from other cases. The legislative "for cause" requirement suggests that there is a protected property interest.[244] If the power of sale provision is a procedural limitation, *Vitek v. Jones* and *Logan v. Zimmerman Brush Co.* impose minimum due process requirements.[245] The contractual nature of the *Johnson* loan raises the issue of whether the

---

237. *Id.* at 3205; Parratt v. Taylor, 451 U.S. at 543.

Wells and Eaton argue that the Court confused the procedural and substantive due process issues in *Parratt v. Taylor*. Wells & Eaton, *supra* note 3, at 218. The same argument may be applied to the facts of *Hudson v. Palmer*. The prisoners in these cases did not advance the argument that the state or its employees had appropriated property for a state use. Thus, the issue was not whether procedural due process had been followed in the appropriation of the property, but whether the negligent or intentional deprivation of property stated a claim in constitutional tort. Wells & Eaton, *supra* note 3, at 219.

238. Hudson v. Palmer, 104 S. Ct. at 3204-05; Parratt v. Taylor, 451 U.S. at 537.

239. Hudson v. Palmer, 104 S. Ct. at 3204; Parratt v. Taylor, 451 U.S. at 541.

240. Johnson v. United States Dep't of Agriculture, 734 F.2d 774, 788 (11th Cir. 1984).

241. *See, e.g.*, O'Bannon v. Town Court Nursing Center, 447 U.S. 773 (holding that nursing home residents did not have a constitutionally protected interest in receiving Medicare and Medicaid benefits at the nursing facility of their choice).

242. *See supra* notes 92-134 and accompanying text.

243. *See supra* notes 210-29 and accompanying text.

244. *See infra* notes 248-57 and accompanying text.

245. *See supra* notes 210-29 and accompanying text.

power of sale provision should be read as a substantive element of the property interest.[246] Finally, it may be argued that the borrowers' properties are indirect interests that are not protected by the due process clause.[247]

A. *The Johnson "For Cause" Requirement*

The Supreme Court's analyses of legislatively created property interests suggest that interests that can be withheld only "for cause" are protected by the due process clause. In *Perry v. Sindermann*, the Court held that the *de facto* tenure status of the professor meant he could not be denied reemployment absent sufficient cause.[248] In *Logan v. Zimmerman Brush Co.*, the procedure guaranteeing the claimant's right to redress employment discrimination unless his claim could not be substantiated created a "for cause" standard.[249] The mandatory language of the legislative grant created a protected interest in *Hewitt v. Helms*.[250] The public utility company was required to provide service to all inhabitants of the area "except for good and sufficient cause" in *Memphis Light, Gas & Water Division v. Craft*; therefore, there was a protected interest.[251] The Eleventh Circuit found that rent and utilities subsidies distributed under section eight of the Existing Housing Assistance Payments Program[252] of the United States Housing Act of 1937 could be withdrawn only for cause and so were protected property interests.[253] Conversely, in *Board of Regents v. Roth*,[254] *Bishop v. Wood*,[255] *Leis v. Flynt*,[256] and *Olim v. Wakinekona*,[257] the governmental discretion

246. *See infra* notes 266-70 and accompanying text.

247. *See infra* notes 271-95 and accompanying text.

248. Perry v. Sindermann, 408 U.S. 593, 602-03 (1972).

249. Logan v. Zimmerman Brush Co., 455 U.S. 422, 431 (1982).

250. 459 U.S. 460, 471-72 (1983).

251. Memphis Light, Gas & Water Div. v. Craft, 436 U.S. 1, 11 (1978).

252. 42 U.S.C. § 1437(f) (1978).

253. Jeffries v. Georgia Residential Fin. Auth., 678 F.2d 919 (11th Cir. 1982).

254. 408 U.S. 564 (1972). Roth's employment of an additional year was subject to "the unfettered discretion of university officials." *Id.* at 567.

255. 426 U.S. 340 (1976). The policeman "held his position at the will and pleasure of the city." *Id.* at 345 n.8.

256. 439 U.S. 438 (1979). Ohio courts had discretion over approving *pro hac vice* appearances. *Id.* at 444 n.5.

257. 103 S. Ct. 1741 (1983). The prison administrator had been granted discretion in transferring inmates. *Id.* at 1741. Prisoner rights may constitute a special exception because prisoners have been found to only have a residuum of liberty, *Id.* at 1745.

Nevertheless, the cases show a meaningful distinction between discretionary and mandatory provisions concerning substantive procedures. In *Olim v. Wakinekona*, the applicable provisions governing interstate transfer granted the prison administrator discretion in transferring inmates. *Id.* at 1747. The Court interpreted this to mean that the legislation did not create a protected liberty interest. *Id.* In *Hewett* the provisions contained mandatory language governing the substantive procedures of inmate segregation. Hewett v. Helms, 103 S. Ct. 864, 871 (1983). The Court found this mandatory language created a protected liberty interest. *Id.*

allowed by the legislative grant denoted the lack of a protected property interest.

These judicial pronouncements suggest that the *Johnson* court was correct in finding that the FmHA borrowers were granted a protected property interest because the homeowner borrowers' loans were not held at the discretion of FmHA.[258] Once the FmHA borrowers qualified for loans, their properties could be taken away only if they failed to make the required payments.[259] It must thereby be concluded that the legislative grant created a property interest that could be taken away only "for cause"—the nonpayment of the loan.

B. *Protected or Conditioned Interests*

The regulatory authority to foreclose on FmHA loans through a nonjudicial procedure may constitute either a procedural limitation affecting a homeowner borrower's property interest or a substantive element of the interest. If the power of sale provision constitutes a procedural limitation, it is possible that the legislative grant creates a protected property interest.[260] If the power of sale provision is interpreted as a substantive condition imposed upon the statutorily created interest, nonjudicial foreclosure would not deprive the borrowers of any protected interest.[261] Thus, there could not be a due process violation.

The question that should have been asked in *Johnson* is whether the government had granted a protected interest that was taken away by reason of the procedural limitation of nonjudicial foreclosure[262] or whether the borrowers' interests in the section 502 loan funds were conditioned upon the acceptance of the accompanying power of sale provision. Although a protected interest once conferred cannot be taken away without appropriate procedural safeguards, accompanying substantive conditions may delineate

---

258. *See generally supra* notes 149-54 and accompanying text.

259. *See generally supra* notes 151-54 and accompanying text.

260. The power of sale provision authorizing nonjudicial foreclosure could be found to impact rather than define the interest granted under the section 502 loan program. *Logan v. Zimmerman Brush Co.* is illustrative of a procedural limitation. *Logan* read the 120-day time period as a procedural limitation governing the statutorily created property right. *See supra* notes 220-29 and accompanying text. In a similar manner, the power of sale provision may be read as a procedural limitation governing the property right created by the section 502 loan program.

261. Interpreting the power of sale provision as a substantive element of the section 502 loan interest is consistent with the reasoning adopted by the Supreme Court in *Arnett v. Kennedy*. The Court found the removal provision governing the employee was part of the employee's substantive right to employment. *See supra* notes 100-08 and accompanying text. It may be argued that the power of sale provision is a substantive element governing the borrowers' interest in their loans.

262. The facts in *Johnson* suggest that foreclosure is possible if there exists adequate cause. *See supra* notes 248-59 and accompanying text.

the existence or scope of the interest.[263] Under the approach adopted by the Supreme Court in *Arnett v. Kennedy*, *Bishop v. Wood*, and *Leis v. Flynt*,[264] the *Johnson* court could have found the loans to be conditioned upon the acceptance of the power of sale provision. The subsequent decisions of *Vitek v. Jones* and *Logan v. Zimmerman Brush Co.*, however, suggest a contrary result and support the conclusion that the power of sale provision is a procedural limitation affecting a protected property interest.[265] These latter cases offer a more recent pronouncement of what constitutes an unconstitutional deprivation and appear to represent a more accurate description of the case law governing FmHA loans.

C. *The Contractual Nature of the Loan*

The contractual nature of the FmHA loans granted to homeowner borrowers suggests that the power of sale clause is a substantive element of the interest. Of course, such an interpretation is diametrically opposed to the conclusion supported by the Supreme Court's *Vitek* and *Logan* opinions whereby the power of sale clause constitutes only a procedural limitation.[266] Yet, selected facts support the former interpretation. The government advanced funds for housing to persons who already had a source of income and who were expected to be able to meet the repayment schedule.[267] Although these funds may constitute a form of government welfare, *Mathews v. Eldridge* clarifies the proposition that termination of government largess does not necessarily invoke the due process requirement of a pretermination evidentiary hearing.[268] Instead, in *Mathews v. Eldridge*, *Hewitt v. Helms*, and *Memphis Light, Gas & Water Div. v. Craft*, the Court relied upon a balancing test to determine the particular dictates of due process.[269]

Application of the *Eldridge* balancing test to foreclosure on FmHA loans would require consideration of the contractual nature of an FmHA note. Unlike the welfare beneficiaries in *Goldberg v. Kelly*, the FmHA borrowers in *Johnson* were not looking to the government for the necessities of life. The FmHA borrowers wanted to be homeowners and were willing to enter into agreements with the government to facilitate the acquisition of their own homes. Part of their bargain with the government was acceptance of the substantive element of a power of sale provision.[270] The provision

---

263. *See, e.g.*, Arnett v. Kennedy 416 U.S. 134, *reh'g denied*, 417 U.S. 977 (1974); Bishop v. Wood, 426 U.S. 340 (1976).

264. *See supra* notes 92-123 and accompanying text.

265. *See supra* notes 210-29 and accompanying text.

266. *See supra* notes 210-29 and accompanying text.

267. *See* Johnson v. United States Dep't of Agriculture, 734 F.2d 774, 776 (11th Cir. 1984).

268. *See supra* notes 188-98 and accompanying text.

269. *See supra* notes 188-209 and accompanying text.

270. *See supra* notes 151-54 and accompanying text.

should thereby be found to govern termination of the property interest affected by foreclosure.

D. *Direct or Incidental Action*

Based on the premise that the government's decision to foreclose on the property constituted an adverse action affecting the property interest, the *Johnson* court concluded that FmHA homeowner borrowers were entitled to the due process safeguards of the fifth amendment.[271] This premise, however, deserves closer scrutiny. It can be argued that the government's action in foreclosing on the property was too indirect to constitute an unconstitutional deprivation of the protected interest.[272] The government only sought to enforce the contractual provisions of the notes, which had been signed by the homeowner borrowers. Thus, termination of the borrowers' interests in their properties was only an incidental consequence of such enforcement.

The recent Supreme Court decision in *O'Bannon v. Town Court Nursing Center*[273] focuses on the directness of the impact of government action on a claimed interest. The issue in that case was whether patients in a nursing facility had a constitutionally protected property interest in continued residence in a particular facility that entitled them to a pretermination hearing.[274] The federal government had decertified the patients' nursing facility without allowing the patients to participate in an evidentiary hearing on the merits of the decertification decision.[275] Decertification meant that the facility no longer qualified for reimbursement for Medicare and Medicaid benefits under the Social Security Act.[276] Patients who desired to continue to receive those benefits would have to transfer to a qualifying facility.[277]

The Court, in an opinion written by Justice Stevens, found that the residents had no right to receive the benefits in the nursing home of their choice.[278] The Court also determined that the relationship between decertification of the nursing home and the legal rights of the patients was indirect.[279] The decertification of the facility did not directly affect the patients' right to continue to receive Medicare or Medicaid benefits.[280] The recipients of the benefits had the right to choose among a range of qualified nursing facilities, but there was no right, statutory or otherwise, to receive benefits

---

271. Johnson v. United States Dep't of Agriculture, 734 F.2d at 782.
272. *See infra* notes 273-83 and accompanying text.
273. 447 U.S. 773 (1980).
274. *Id.* at 775.
275. *Id.* at 776-77.
276. *Id. citing* 42 U.S.C. § 1396(a)(23) (1982).
277. O'Bannon v. Town Court Nursing Center, 447 U.S. at 780.
278. *Id.* at 785.
279. *Id.* at 788.
280. *Id.* at 786-88.

in a facility that did not meet statutory conditions for skilled nursing facilities.[281] Since the recipients could still receive these benefits by transferring to a qualifying facility, they were not deprived of their property interest in the benefits.[282] Thus, the Court found that the incidental result of the government's decertification failed to amount to a deprivation of the patients' liberty or property interests.[283]

The Court's conclusion that government action may be too remote or indirect to invoke due process protection is not surprising.[284] The *O'Bannon* Court's determination that the patients' loss of their home was indirect and incidental is not so obvious. Nursing facilities are certified in order that their patients may qualify for Medicare and Medicaid benefits.[285] The decertification of a facility will inevitably necessitate the transfer of patients to a qualifying home so they can continue to receive the Medicare or Medicaid benefits.[286] Decertification may thereby be expected to cause patients to suffer emotional and physical harm,[287] as well as transfer trauma.[288]

Although it can be argued that decertification directly affected the patients' interests, the argument does not require the conclusion that the patients were denied due process. As suggested by Justice Blackmun in his concurrence, the patients' interest in continued residence at the nursing facility was conditioned on qualification of the home under governmental guidelines.[289] Since the government had granted patients an entitlement conditioned on certification, failure to fulfill the condition meant there was no property interest.[290]

FmHA initiated the foreclosure proceedings considered by the Eleventh Circuit in *Johnson* because the homeowner borrowers had failed to meet the

---

281. *Id.* at 782, 784-85.

282. *Id.* at 782 n.13.

283. *Id.* at 787.

284. Justice Stevens, in his majority opinion in *O'Bannon*, relied on *Martinez v. California*, 444 U.S. 277 (1980), to conclude that the government's activity was too remote to be a deprivation. O'Bannon v. Town Court Nursing Center, 447 U.S. at 780. *Martinez* involved an allegation that a state statute granting qualifying public employees, who make parole-release determinations, absolute immunity to claims arising from their determinations deprived a murder victim of her life without due process. Martinez v. California, 444 U.S. at 279-81. The victim had been murdered by a parolee and her survivors sought to hold the parole-release officials liable in damages for the harm caused by the parolee. *Id.* at 279. A unanimous Court found that the parole decision was not directly related to the victim's death so there could not be a due process violation. *Id.* Thus, the government's activity was too remote from the infringement of the protected interest.

285. O'Bannon v. Town Court Nursing Center, 447 U.S. at 786-87.

286. *Id. See* Note, *O'Bannon v. Town Court Nursing Center, Inc.: Limiting the Due Process Rights of Nursing Home Residents*, 24 ST. LOUIS U.L.J. 828 (1980).

287. O'Bannon v. Town Court Nursing Center, 447 U.S. at 802 (Blackmun, J., concurring).

288. *Id.* at 784-85 n.16.

289. *Id.* at 802 (Blackmun, J., concurring).

290. *Id.*

contractual provisions of the note.[291] The legislative grant provided qualifying rural residents funds for housing.[292] By accepting funds under the note, borrowers also accepted the limitations embodied in the note. Once borrowers failed to make scheduled payments, they had no right to the continued use of loan funds.[293] FmHA's foreclosure did not deprive delinquent borrowers of any enforceable expectation of continued use of government funds; foreclosure was an incidental consequence of borrowers' failure to meet their contractual obligations.

A determination of the issue of directness does not resolve the question of whether the power of sale provision is a procedural limitation on the interest or a substantive element of the interest. The "for cause" requirement suggests that the power of sale provision is simply a procedural limitation on a protected interest.[294] The contractual nature of the grant, however, suggests that the power of sale clause is a substantive element of the interest.[295]

VII. No Deprivation in Johnson

The Eleventh Circuit analyzed the issue of whether a due process violation had occurred under the assumption that delinquent borrowers had received notice of the pending nonjudicial foreclosure and of their right to an appeal procedure, which included a hearing.[296] Since the nonjudicial foreclosure procedure included an opportunity for borrowers to request an agency hearing prior to the foreclosure, the due process issue centered upon whether the procedure provided borrowers a meaningful opportunity to contest.[297] Accepting the premise that notice was given, the borrowers' argument is limited to the meaningfulness of this opportunity.

A. *Meaningful Opportunity to Contest*

The *Johnson* decision suggested that a meaningful opportunity for the borrowers to contest involved the knowing and intelligent waiver by the borrowers of a judicial foreclosure procedure that would have included a full court proceeding prior to foreclosure to avoid premature foreclosure.[298] Premature foreclosures of FmHA loans may occur by reason of the incorrect calculation of interest credit.[299] An overstatement of a borrower's income would cause an unwarranted increase in the amount of the borrower's

---

291. Johnson v. United States Dep't of Agriculture, 734 F.2d at 779-81.
292. 42 U.S.C. § 1471 (1982).
293. *See supra* note 153 and accompanying text.
294. *See supra* notes 248-59 and accompanying text.
295. *Contra* Coleman v. Block, 562 F. Supp. 1353, 1364 (D.N.D. 1983).
296. Johnson v. United States Dep't of Agriculture, 734 F.2d at 782.
297. *Id.*
298. *Id.* at 783-84, 787-88.
299. *Id.* at 787.

monthly payments.[300] Wrongful calculation of the monthly payments could indicate that a borrower's failure to make full payment did not constitute a default justifying foreclosure.

The *Johnson* court recognized "that there is no absolute right to judicial foreclosure," but only a right to due process.[301] After announcing this principle, however, the court assumed that the borrowers were entitled to know what they were waiving in giving up the judicial foreclosure procedure.[302] The court identified an automatic hearing, the shift in the burden of proof, and "other processes in the power of sale" as items waived by the power of sale provision.[303]

The Eleventh Circuit decided that the homeowners' waiver of the above items may not have been made in a knowing and intelligent manner; thus, there may have been a due process violation.[304] Nevertheless, in view of the court's earlier statement that there was no right to a judicial foreclosure, it is unclear how the court could justify its reliance upon the waiver of certain processes inherent in a judicial foreclosure to conclude that a nonjudicial foreclosure procedure might be inadequate.[305] A determination of the issue of whether the borrowers' had a meaningful opportunity to be heard is not dependent upon the processes available in judicial foreclosure. Rather, the determination depends upon the adequacy of borrowers' ability to raise objections prior to the foreclosure of their homes under the nonjudicial foreclosure procedure.

B. *Discretionary Right to Judicial Foreclosure*

The court accepted the premise that the benefits of a judicial procedure would have accrued to borrowers absent the power of sale provision.[306] That premise, however, may be incorrect.[307] An analysis of the legislation of those

---

300. *Id.*

301. *Id.* at 783.

302. *Id.* at 784. Deference to *Leis v. Flynt*, 439 U.S. 438 (1979), requires a conclusion that the borrowers in a state where nonjudicial foreclosure is permitted did not give up any protected right. *See supra* notes 115-23 and accompanying text. In *Leis*, the Court found that there was no right for out-of-state attorneys to appear *pro hac vice*. Leis v. Flynt, 439 U.S. at 438. The Court apparently also rejected the argument set forth in the dissent that local custom may establish an implicit promise that out-of-state attorneys may appear in Ohio courts. *Id.* at 444 n.5. In the same manner, borrowers in a state that allows nonjudicial foreclosure would not have any expectation that a foreclosure would occur through a judicial procedure, and thus, there is no absolute right to the processes that are only provided through judicial foreclosures.

303. Johnson v. United States Dep't of Agriculture, 734 F.2d at 783 n.7.

304. *Id.* at 784.

305. It should also be concluded that FmHA did not have an obligation to provide borrowers with an interpretation of the power of sale provision. *See* United States v. Henderson, 707 F.2d 853, 856 (5th Cir. 1983).

306. *See* Johnson v. United States Dep't of Agriculture, 734 F.2d at 783-84.

307. It is not clear that FmHA borrowers in Alabama had any expectancy of a judicial foreclosure procedure. The court noted that "Alabama law authorizes the use of non-judicial

states that permit nonjudicial foreclosure fails to disclose any expectancy or right to judicial foreclosure.[308] Rather, lenders have the discretion to proceed either judicially or nonjudicially.[309] Thus, it cannot be said that there was an expectancy or an entitlement to judicial foreclosure.

The discretion granted to lenders in states that allow nonjudicial foreclosures lends support to the conclusion that the FmHA borrowers were not entitled to a judicial foreclosure procedure. In *Board of Regents v. Roth*, *Bishop v. Wood*, *Leis v. Flynt*, and *Olim v. Wakinekona*, the government had discretionary authority to terminate interests.[310] The general conclusion of each of these cases was that the discretion precluded a finding that there was a protected property interest.[311] Similarly, the government's discretionary ability to foreclose nonjudicially in Alabama indicates that FmHA borrowers in that state had no expectation that they would receive the processes or procedural protections inherent in a judicial foreclosure proceeding.

C. *What Process is Due*

The Supreme Court's recent considerations of the dimensions of procedural protection in *Vitek v. Jones*, *Logan v. Zimmerman Brush Co.*, *Parratt v. Taylor*, and *Hudson v. Palmer* provide insight on what process should be afforded to the homeowner borrowers.[312] The Court has found that once a legislative grant establishes a protected interest, it cannot be taken away without due process of law.[313] This finding, however, does not mean that the legislative grant also establishes the degree of process that is due. Rather, these cases imply that the Court views the issue of whether adequate procedural protection has been afforded as a question to be answered by the judiciary.[314]

An analysis of the adequacy of the homeowner borrowers' opportunity to contest reveals that *Johnson* may be distinguished from *Vitek v. Jones* and *Logan v. Zimmerman Brush Co.* because the homeowners in *Johnson* received notice that they could request a hearing concerning their delinquency prior to foreclosure. In *Vitek v. Jones* the Court afforded the inmate due process protection beyond that granted by the statute in order to pro-

---

foreclosure, whether or not a power of sale clause is contained in the note." *Id.* at 777. *See* ALA. CODE § 35-10-3 (1977).

308. *See, e.g.*, CAL. CIV. CODE §§ 2924h (West 1974 & Supp. 1985); N.C. GEN. STAT. § 45-21.1 (1984); N.D. CENT. CODE § 35-22-01 (1983); TEX. PROP. CODE § 51.002 (1984).

309. *See supra* note 308.

310. *See supra* notes 87-91, 109-34 and accompanying text.

311. *See supra* notes 87-91, 109-34 and accompanying text.

312. *See supra* notes 210-17, 220-39 and accompanying text.

313. *See* Hewitt v. Helms, 103 S. Ct. 864, 872 (1983). *But cf.* Olim v. Wakinekona, 103 S. Ct. 1741 (1984) (rights given by prison regulations could be taken away).

314. *See* Smolla, *The Erosion of the Principle*, *supra* note 3, at 492.

tect the inmate's legislatively created liberty interest.[315] Adequate notice and an opportunity to be heard were required before the inmate could be transferred to a mental hospital.[316] On the other hand, the FmHA borrowers received notice from FmHA that they might lose their properties and were informed that they could request a hearing.[317] Thus, borrowers were given an opportunity to raise issues concerning the miscalculation of their monthly mortgage payments prior to foreclosure.

In *Logan v. Zimmerman Brush Co.*, the Court found that the government's ability to preclude the claimant from asserting his unfair discrimination claim without an opportunity for the claimant to be heard was violative of the due process clause.[318] The nonjudicial foreclosure procedure in *Johnson*, however, provided the borrowers with an opportunity to be heard since the borrowers were notified that they could request a hearing prior to foreclosure.[319] That it was incumbent upon the borrowers to request the hearing[320] obviously detracts from the meaningfulness of their opportunity to be heard, but the possibility of an opportunity to be heard at a hearing is sufficiently dissimilar from the statutory procedure in *Logan v. Zimmerman Brush Co.*[321] In addition, in *Logan v. Zimmerman Brush Co.*, the claimant's property interest was destroyed prior to any opportunity to be heard, the property interests of FmHA borrowers in *Johnson* were not irretrievably destroyed by the nonjudicial foreclosure procedure.[322] The opportunity to be heard *and* the availability of post-foreclosure remedies, suggests that the nonjudicial foreclosure procedure satisfied due process requirements.

Parratt v. Taylor and *Hudson v. Palmer* raise the argument that the existence of a post-foreclosure remedy may be sufficient to satisfy due process requirements.[323] Nonjudicial foreclosure does not preclude foreclosed homeowner borrowers from asserting post-foreclosure claims for monetary or other relief and receiving adequate compensation.[324] The borrowers' post-

---

315. *See supra* notes 210-17 and accompanying text.

316. Vitek v. Jones, 445 U.S. 480, 494-96 (1980).

317. This was an assumption adopted by the Eleventh Circuit. Johnson v. United States Dep't of Agric., 734 F.2d at 782. The court recognized that any deviation from the notice requirements of the legislative grant might constitute a due process violation. *Id.* Conversely, the court noted that "[t]here is no right to non-judicial foreclosure." *Id.* at 783 n.7. By accepting the premise that there is no right to judicial foreclosure, however, the court excluded the possibility that the borrowers had a property interest in a judicial foreclosure procedure.

318. *See supra* notes 220-29 and accompanying text.

319. Johnson v. United States Dep't of Agriculture, 734 F.2d at 782.

320. *Id.*

321. *See* ILL. REV. STAT. ch. 48, §858(b) (1970).

322. *See infra* note 324 and accompanying text.

323. Hudson v. Palmer, 104 S. Ct. 3194 (1984); Parratt v. Taylor, 451 U.S. 527 (1981). *See supra* notes 232-39 and accompanying text.

324. Johnson v. United States Dep't of Agriculture, 734 F.2d at 781. The United States Magistrate found that foreclosed borrowers could file for damages and may be able to use a *lis pendens* to obtain relief. *Id.*

foreclosure remedies, however, fail to adequately compensate them for the hardship that accompanies premature foreclosure and eviction. Thus, the availability of post-foreclosure remedies offers little support for a finding that the borrowers had a meaningful opportunity to be heard.[325]

It also may be argued that the nature of the FmHA borrower's property interest is distinguishable from a person's liberty interest. It is therefore unclear whether the Court's pronouncements in *Vitek*, *Parratt* and *Hudson* are relevant. The different nature of various liberty and property interests may determine what constitutes a meaningful opportunity to be heard.

D. *Application of the Eldridge Balancing Test*

An analysis using the *Eldridge* balancing test may be an appropriate means for evaluating whether the borrowers in *Johnson* had a meaningful opportunity to contest foreclosure.[326] In *Mathews v. Eldridge* the Court recognized that "[a]t some point the benefit of an additional safeguard to the individual affected by the administrative action and to society in terms of increased assurance that the action is just, may be outweighed by the cost."[327] *Mathews v. Eldridge*, however, involved the termination of a property interest without an opportunity for a pretermination hearing.[328] Since *Johnson* accepted the premise that borrowers had been provided notice of their right to an appeal procedure,[329] the *Eldridge* balancing test only illustrates some of the concerns that should be considered in determining whether the borrowers had meaningful opportunity to contest.

The first factor of the *Eldridge* balancing test is the private interest affected by the official action and the degree of potential deprivation.[330] The deprivation effected by a premature foreclosure is serious. The homeowner borrowers are concerned about decent housing and their ability to continue to own and live in their own homes. Although such persons may be better off than the welfare beneficiaries in *Goldberg v. Kelly*, who depended upon the government's largess for their sustenance,[331] and the disability recipient in *Mathews v. Eldridge*, whose chronic anxiety and back strain had prevented him from continuing with his employment,[332] foreclosure causes a real hardship. A premature foreclosure results in the eviction of borrowers

---

325. This conclusion is inferred from the dicta of *Memphis Light, Gas & Water Div. v. Craft*, 436 U.S. 1 (1978). In that case, the Court found that "[e]quitable remedies are particularly unsuited to the resolution of factual disputes typically involving sums of money too small to justify engaging counsel or bringing a law suit." *Id.* at 21.

326. *See supra* notes 188-98 and accompanying text.

327. Mathews v. Eldridge, 424 U.S. 319, 348 (1976). *See also* Parratt v. Taylor, 451 U.S. at 542-43.

328. Mathews v. Eldridge, 424 U.S. at 324.

329. Johnson v. United States Dep't of Agriculture, 734 F.2d at 782.

330. Mathews v. Eldridge, 424 U.S. at 334-35.

331. Goldberg v. Kelly, 397 U.S. 254, 254 (1970).

332. Mathews v. Eldridge, 424 U.S. at 324 n.2.

from their homes and necessitates finding alternative housing. Borrowers who have not been able to meet mortgage payments would be likely to experience difficulty in finding suitable alternative housing.[333]

The second factor mentioned in *Eldridge* is the fairness and reliability of the existing pretermination procedural safeguards.[334] The *Johnson* court questioned the reliability of the preforeclosure procedures and suggested that the wrongful calculation of mortgage payments constituted evidence supportive of a conclusion that nonjudicial foreclosure procedures unfairly deprived borrowers of their rightful interests.[335] The borrowers, however, presumably had an opportunity to contest the excessive mortgage payments at an administrative hearing held prior to the government's decision to foreclose.[336] Requiring judicial foreclosure would provide borrowers with an additional opportunity to contest the calculation of the monthly mortgage payments, but due process has not been found to require multiple opportunities to be heard.

In *Mathews v. Eldridge*, the Court distinguished between the reliability of documentation for a disability benefit and the reliability of documentation for a welfare entitlement.[337] The Court found that the medical assessment of a worker made for the purpose of establishing a disability claim was "a more sharply focused and easily documented decision than the typical determination of welfare entitlement."[338] Applying this indicia of reliability

---

333. A federal district court found that "the termination of allowances for necessary living and operating expenses" of FmHA farmer borrowers involved a deprivation of a property interest. Coleman v. Block, 562 F. Supp. 1353, 1364-65 (D.N.D. 1983). Since the termination of the funds in *Coleman* would have left borrowers without food and caused the cessation of borrowers' employment, the borrowers were entitled to notice and an opportunity for comment. *Id.* at 1365-66. The borrowers in *Johnson* did not have such a weighty argument; foreclosure would not deprive them of food or employment.

334. Mathews v. Eldridge, 424 U.S. at 343.

335. Johnson v. United States Dep't of Agriculture, 734 F.2d at 787.

336. The failure of borrowers to request a hearing to contest FmHA's calculation of the interest credit would mean that the borrowers failed to exhaust their administrative remedies. *See* Coleman v. Block, 562 F. Supp. 1353, 1355 (D.N.D. 1983). Mrs. Johnson, Mrs. Lowe and Mrs. Marshall contested the method of calculating their interest credit. Johnson v. United States Dep't of Agriculture, 734 F.2d at 787. Mrs. Johnson had never requested a hearing so it may be concluded that she failed to exhaust her administrative remedies. *Id.* at 780. Mrs. Lowe claimed that she had never received notice of her right to appeal so apparently had never requested a hearing. *Id.* The court either made a contrary finding or proceeded on the assumption that Mrs. Lowe could raise this issue on remand. Mrs. Marshall had signed a new interest credit agreement in September 1981 and her property was foreclosed in October 1981. *Id.* She appealed the decision and among her claims alleged that the agreement she signed one month before foreclosure wrongfully computed her interest credit. *Id.* It would appear to follow that Mrs. Marshall had an opportunity to contest, either at the time she signed the agreement or during her appeal. *Id.* at 780-81.

337. Mathews v. Eldridge, 424 U.S. at 342-43.

338. *Id.* at 343. A federal district court noted the non-reliability of FmHA's termination of funds in *Coleman v. Block*, 562 F.Supp. 1353, 1366 (D.N.D. 1983). An FmHA county supervisor determines when a farm borrower is in default on the loan and makes the decision to liqui-

to *Johnson*, a court should conclude that nonjudicial foreclosure involves a sharply focused and easily documented decision. Although the *Johnson* court expressed concern that a borrower may need to contest the miscalculation of interest credit, it appears that this need existed only because the borrower had failed to raise a timely request for an administrative hearing.[339] *Johnson* thereby does not delineate facts supportive of a conclusion that nonjudicial foreclosures are unreliable.

The facts in *Johnson* raised the question of whether borrowers' opportunity to be heard was meaningful since the hearing officer was a FmHA employee.[340] The court noted that the hearing officer was generally a nearby FmHA district director.[341] The hearing officer evaluated decisions to foreclose that had already been approved by the officer's boss, the state director.[342] While the independence of such an officer may be questionable, this custom would appear to be permissible in view of the *Vitek* decision that found "that the independent decision maker . . . need not come from outside the [government agency]" in order for a hearing to provide a meaningful opportunity to be heard.[343] In *Hewitt v. Helms*, the Court concluded that due process could be satisfied by an informal, nonadversary, evidentiary review by the official making the determination being contested.[344]

Since there was no evidence of an impropriety on the part of a hearing officer in *Johnson*, the court did not have any evidence to support a finding that the borrowers were denied a meaningful opportunity to contest or that the nonjudicial foreclosure procedure was unfair. Nonjudicial foreclosure constitutes a fair procedure as determined by the legislative bodies that have sanctioned the procedure. That this same procedure is available to other lenders within these states suggests that the procedure constitutes a reliable pretermination procedure.[345]

The third *Eldridge* factor is the public interest in limiting additional financial costs.[346] Application of this factor to the facts of *Johnson*, would require consideration of the public's interest in foreclosing in an expeditious

---

date. *Id.* at 1363. The decision to liquidate operates to terminate the allowances for necessary living and operating expenses. *Id.* Since the decision that the farmer is in default involves "consideration of the farmer's ability to farm and diligence," the court concluded that the termination was not sharply focused or easily documented. *Id.* at 1366. This meant that a pretermination hearing would constitute a valuable procedure in assuring the accurate determination of whether the farmer was in default. *See id.* at 1366.

339. *See supra* note 336.

340. Johnson v. United States Dep't of Agriculture, 734 F.2d at 783.

341. *Id.*

342. *Id.*

343. Vitek v. Jones, 445 U.S. 480, 496 (1980).

344. Hewitt v. Helms, 103 S. Ct. 864, 872-73 (1983).

345. The major distinction between FmHA and other lenders that affects the reliability of a foreclosure is that FmHA loans have variable interest rates that in turn affect the payments owed by the borrower. *See supra* note 300 and accompanying text.

346. Mathews v. Eldridge, 424 U.S. at 397.

fashion in order to preserve the value of the properties. Although judicial foreclosures take longer and use more government resources,[347] these facts clearly do not justify the use of a procedure that results in the premature foreclosure of a borrower's property since such foreclosure is contrary to the purpose of the Housing Act.[348] Rather the borrowers' interest must be balanced against the cost of providing a judicial foreclosure.

In *Johnson*, the interest of the borrowers was identified as an interest in protection against premature foreclosure; the miscalculation of mortgage payments was causing borrowers to be wrongfully evicted from their homes.[349] Although this is a weighty interest, it has not been shown that the borrowers did not have a meaningful opportunity to protect this interest prior to the initiation of the nonjudicial foreclosure proceeding.[350] Thus, a borrower's interest in a judicial foreclosure is arguably minimal, and it may be surmized that the public's interest in foreclosing through a nonjudicial foreclosure procedure is the more weighty of the interests.

VIII. Conclusion

Johnson raised some important questions concerning the procedural safeguards that should be afforded borrowers of FmHA loans prior to the foreclosure of their properties. The court was correct in concluding that the section 502 loans constituted a statutory entitlement that was protected by the fifth amendment's due process clause.[351] The court also correctly noted that borrowers were not automatically entitled to a judicial foreclosure procedure.[352] The court, however, failed in its analysis of what process was due. Due process is not governed by what the borrowers may have waived when they obtained their section 502 loans. Due process requires notice and meaningful opportunity to be heard.[353]

Although *Johnson* raised questions about whether there were individual situations in which a borrower either had not received notice or had not had

---

347. The *Johnson* court disputed FmHA's figures but did find that there were carrying costs associated with judicial foreclosures. Johnson v. United States Dep't of Agriculture, 734 F.2d at 788. The magistrate, however, had found that the failure to resell foreclosed homes of delinquent borrowers would disserve the public interest by not recycling the funds to other qualified borrowers. *Id.*

348. *Id.*

349. *Id.* at 787.

350. *Johnson* fails to delineate meaningful data concerning the borrowers' need for the safeguards of judicial foreclosure. The court identified three persons with claims concerning the miscalculation of interest credit but failed to establish a ground for relief for two of these persons. *See supra* note 336. How many borrowers raise viable objections during judicial foreclosure? How many borrowers even bother to contest a FmHA initiated judicial foreclosure?

351. *See* Johnson v. United States Dep't of Agriculture, 734 F.2d at 782.

352. *See id.* at 783.

353. *Id.* at 782.

a meaningful opportunity to be heard,[354] the court did not substantiate its finding that there existed a due process violation. The court found that the regulation provided adequate notice.[355] The court found that each borrower had been given an opportunity to contest the foreclosure through an administrative appeal that provided for a hearing.[356] In the absence of any evidence that a borrower had been denied fair and unbiased treatment at the legislatively sanctioned administrative hearing, it cannot be concluded that any borrower was deprived of a meaningful opportunity to contest the foreclosure.

Johnson does raise a question whether the independent decision maker at the hearing had the independence to make a neutral determination.[357] If the decision maker was not neutral, the borrower would not have received a meaningful opportunity to contest FmHA's decision to foreclose.[358] This would appear to be an issue that may be addressed in future litigation.

The Eleventh Circuit implied that a decision precluding nonjudicial foreclosure in Alabama would enable delinquent borrowers to receive the added procedural safeguards of a judicial procedure.[359] This may not be true. The voluntary debt adjustment and debt settlement provisions of the Code of Federal Regulations[360] enables FmHA to acquire properties of delinquent borrowers without the protections of a judicial foreclosure. FmHA and delinquent borrowers may agree to the voluntary conveyance of the properties to FmHA for cancellation of the underlying debt.[361] Although a voluntary conveyance enables delinquent borrowers to avoid premature foreclosure by refusing to enter into an agreement with FmHA,[362] it is not clear that the procedure offers as many procedural safeguards as a nonjudicial foreclosure.

FmHA has a considerable number of delinquent borrowers[363] and presumably incurs considerable carrying charges when it acquires and holds properties in its inventory.[364] In order to protect its interests and recycle the properties and funds to other borrowers, FmHA needs to be able to respond to delinquency problems in a timely fashion. In certain instances, nonjudicial foreclosure offers a viable and possibly a preferred solution for the resolution of a delinquency problem. The *Johnson* injunction against nonjudi-

---

354. *Id.*

355. *Id.* at 782.

356. *Id.* This statement would appear to disregard Mrs. Lowe's allegation that she had not received notice. *Id.* at 780. *See supra* note 336.

357. *See supra* notes 340-44 and accompanying text.

358. *See supra* notes 340-44 and accompanying text.

359. *See* Johnson v. United States Dep't of Agriculture, 734 F.2d at 783.

360. 7 C.F.R. §§ 1864, 1903 (1984).

361. *See id.* § 1903.

362. *See id.*

363. *See supra* notes 53-55 and accompanying text.

364. *See* Johnson v. United States Dep't of Agriculture, 734 F.2d at 787-88.

cial foreclosures may be expected to cause FmHA to respond to delinquencies through the voluntary conveyance procedure, which may be accompanied by the subtle use of pressure on delinquent borrowers to agree to a voluntary conveyance.

Data from Georgia suggests that the nonavailability of nonjudicial foreclosure has fostered the use of the voluntary conveyance procedure.[365] By virtue of a consent decree in *Williams v. Butz*,[366] FmHA has agreed not to foreclose against FmHA borrowers in Georgia under Georgia's nonjudicial foreclosure statute. At the end of September of the 1984 fiscal year, FmHA had 447 foreclosures pending in Georgia.[367] At the same time, FmHA had completed 47 foreclosures and 565 voluntary conveyances.[368] These figures indicate that only one out of every thirteen delinquent borrowers is receiving a full court proceeding in Georgia.[369] Thus, the court's laudatory objective of providing delinquent borrowers a full court proceeding prior to the loss of their property has not been achieved.

365. *See infra* notes 367-69 and accompanying text.

366. No. CV-176-173 (S.D. Ga. filed Oct. 7, 1979).

367. FARMERS HOME ADMINISTRATION, U.S. DEP'T OF AGRIC., RURAL HOUSING LIQUIDATION ACTION/INVENTORY PROPERTY FISCAL YEAR 1984 MONTH ENDING SEPTEMBER (report by the Georgia State FmHA Office).

368. *Id.*

369. *Id.*